92-1170

12-9

92-1170

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAY F. LANSING
MOSES LAW FIRM
P. O. Box 2533
Billings, Montana 59103-2533
(406)248-7702

COUNSEL FOR PETITIONER

58 pp

No. 92-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAY F. LANSING
MOSES LAW FIRM
P. O. Box 2533
Billings, Montana 59103-2533
(406)248-7702

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether 16 U.S.C. Section 3373(d) of the Lacey Act was properly construed so as to permit the price paid for guiding services to be used in determining the "market value" of the wildlife?

2. Whether the jury instruction providing for two methods in determining the "market value" of wildlife was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution?

3. Whether the application to the Petitioner of Amendment Number 407 of Section 2Q2.1 of the Federal Sentencing Guidelines violated the Ex Post Facto Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
Questions Presented for Review	ii
Table of Authorities	iv
Report of Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	3
Statement of the Case	4
Argument --	
Question No. 1	9
Question No. 2	17
Question No. 3	32
Conclusion	49
Filing and Service Verification	50

TABLE OF AUTHORITIES

	Page
CASES CITED:	
Busic v. U.S. 446 U.S. 398 (1980)	17
Miller v. Florida 482 U.S. 423 196 L.Ed.2d 351 107 S.Ct. 2446 (1987)	43
United States v. Anderton 629 F.2d 1044, 1049 and n.5 (5th Cir. 1980)	21
U.S. v. Atkinson 966 F.2d 1270 (9th Cir. 1992)	2, 38
U.S. v. Combs 762 F.2d 1343 (9th Cir. 1985)	22
United States v. Martinez 946 F.2d 100 (9th Cir. 1991)	41

U.S. v. Stenberg
803 F.2d 422 (9th Cir.) 11

U.S. v. Suarez
911 F.2d 1016
(5th Cir. 1990) 47

United States v. Wentz
800 F.2d 1325
(4th Cir. 1986) 26

CODES:

16 U.S.C. Section 3372(2)(A) 9

16 U.S.C. Section 3373 10, 14

FEDERAL SENTENCING GUIDELINES:

2Q2.1 33, 35

2Q2.2

Amendment 407 40

COMES NOW the Petitioner, Melville O'Neal Atkinson, and respectfully prays that the Supreme Court of the United States issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

On April 27, 1992, the United States Court of Appeals for the Ninth Circuit issued its opinion in Cause No. 91-30084 in which the United States Court of Appeals for the Ninth Circuit affirmed the conviction and sentence of Melville O'Neal Atkinson. A copy of the opinion is set forth in the appendix as Exhibit "B". A timely Petition for Rehearing was filed on behalf of Mr. Atkinson which was eventually denied on July 17, 1992. On July 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its Order and

Amended Opinion in Cause No. 91-30084. A copy of the Order and Amended Opinion is set forth in the appendix as Exhibit "A". This Amended Opinion can now be properly cited as *U.S. v. Atkinson*, 966 F.2d 1270 (9th Cir. 1992).

JURISDICTION

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 22, 1992. A timely Petition for Rehearing was denied on September 10, 1992. This Petition for Writ of Certiorari, which is mailed on December 9, 1992, is timely as required by Supreme Court Rule 13.1 and Rule 13.4.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 9(3)

(Pertinent text set forth in the Appendix)

United States Constitution, Fifth Amendment

(Pertinent text set forth in the Appendix)

United States Constitution, Sixth Amendment

(Pertinent text set forth in the Appendix)

Lacey Act - 16 U.S.C. Section 3372

(Pertinent text set forth in the Appendix)

1988 Amendments to 16 U.S.C. Section 3372

(Pertinent text set forth in the Appendix)

Lacey Act - 16 U.S.C. Section 3373

(Pertinent text set forth in the Appendix)

1988 Amendments to 16 U.S.C. Section 3373

(Pertinent text set forth in the Appendix)

Section 2Q2.1 of Federal Sentencing Guidelines

(Pertinent text set forth in the Appendix)

Amended Section 2Q2.1 of Federal Sentencing Guidelines

(Pertinent text set forth in the Appendix)

STATEMENT OF THE CASE

A. Statement of the Facts

The Petitioner, Melville O'Neal Atkinson, owned and operated Neal's Wilderness Outfitters, Inc., a Jacksonville, Florida business which acted as a booking agent for hunting expeditions in the State of Montana. Arrangements would then be made to have the actual guiding of the hunters performed by Montana outfitters or landowners. In November of 1989, Mr. Atkinson booked a number of hunters from the southeast portion of the United States to hunt in Montana.

Most hunters paid the standard booking fee of One Thousand Five Hundred and No/100ths ($1,500.00) Dollars. The booking fee was then to be split with the outfitter or landowner, who in this case were Wayne Bacon and Brian Nelson. Lodging, meals, and ground transportation were included in the booking fee.

During the hunts in November of 1989, it was alleged that approximately 14 deer were illegally taken in violation of the Lacey Act, specifically a violation of 16 U.S.C. Section 3372 and Section 3373. The Indictment filed against Mr. Atkinson, a copy of which is included in the Appendix, alleged eight counts of conspiracy to violate the Lacey Act coupled with 13 counts of either attempted violation of the Lacey Act or aiding and abetting the violation of the Lacey Act. Atkinson was tried before a jury, was convicted on all 21 counts, and he was sentenced to a term of 37

months imprisonment. He appealed his conviction and sentence to the United States Court of Appeals for the Ninth Circuit on various grounds, two of which were the "market value" issue and the Federal Sentencing Guideline issue. As previously stated, the United States Court of Appeals for the Ninth Circuit affirmed the conviction and sentence of Mr. Atkinson.

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the District of Montana, Billings Division, is the alleged violations of federal statutes, namely 16 U.S.C. Sections 3372 and 3373 and 18 U.S.C. Section 371.

ARGUMENT

A. Introduction

The Petition for Writ of Certiorari filed in this case concerns the construction and interpretation of the Lacey Act, specifically 16 U.S.C. Sections 3372 and 3373, together with the corresponding Federal Sentencing Guideline. As a review of Section 3372 and Section 3373 reveals, these particular sections are concerned with the trafficking of illegally taken wildlife. Although at first blush it would appear that the Lacey Act has little impact upon and is of little importance to most citizens, namely those who live in urban areas, it is crucial to point out the fact that it is precisely these urban citizens, who travel to the sparsely populated West to hunt, that the Lacey Act is most often applied due to the fact that the out-of-state hunter who

transports part of his wildlife home conveniently satisfies the interstate commerce element of the Lacey Act.

As the number of Lacey Act prosecutions have increased, so has the frequency of various legal issues, most predominately the valuation issue. Although Congress attempted to amend the Lacey Act following the decision by the United States Court of Appeals in *U.S. v. Stenberg*, 803 F.2d 422 (9th Cir. 1986), Congress has seemed to only complicate and perpetuate the issues, especially as to the element of "market value." The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law regarding the issue of valuation and the Lacey Act, and the Petitioner, Mr. Atkinson, sincerely believes that this questions which has not been, but should be, settled by this Honorable Court.

B. Questions Presented for Review

1. Whether 16 U.S.C. Section 3373(d) of the Lacey Act was properly construed so as to permit the price paid for guiding services to be used in determining the "market value" of the wildlife?

Mr. Atkinson was charged in this case with several violations of 16 U.S.C. Section 3372(2)(A) which provides:

> "It is unlawful for any person ... (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law. . . ."

While the substantive offense is set forth in Section 3372, the penalty provisions are set forth in a separate

section, namely 16 U.S.C. Section 3373(d)(1) which provides:

> "Any person who --
>
> (A) . . . or,
>
> (B) violates any provision of this chapter (other than subsections (b) and (d) of Section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,
>
> knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a

> separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants."

Therefore, it should initially be noted that the Lacey Act provides for the substantive violation in one section and the penalty provisions in another, and market value is only mentioned in the penalty provisions of Section 3373.

In 1986, the United States Court of Appeals for the Ninth Circuit rendered its opinion in *U.S. v. Stenberg*, 803 F.2d 422 (9th Cir. 1986). In *Stenberg* the Court held that the Lacey Act's prohibition of the "sale of wildlife" did not apply to the sale of guiding services

or hunting permits. Mr. Stenberg also challenged the jury instruction dealing with "market value."

> "The District Court instructed the jury that:
>
> The market value of wildlife may be established by several methods.
>
> One method is, of course, the price a piece of property would bring if sold on the open market between willing buyer and seller.
>
> Another method to establish market value is the price paid for guiding services for the hunt in which the wildlife was taken.
>
> Either of the above methods is a proper method to use in determining market value."

Mr. Fike contended that the Court's instruction failed to provide an appropriate standard for assessing the

market value of the wildlife, and the Court responded at page 433 as follows:

> "Because we reverse Fike's conviction on the only count on which evidence was introduced as to 'the price paid for guiding services,' *infra* section VI, we need not consider the third paragraph of the court's instruction. The second paragraph of the instruction, which governed the deliberations on all other counts, required the jury to determine the price the wildlife would bring 'if sold on the open market between a willing buyer and seller.' This formulation corresponds to typical definition of 'market value.' *See, e.g.,* 55 C.J.S. *Market* at 789-97 (1948) (citing cases); Black's Law Dictionary 1123 (4th ed. rev. 1976. ..."

In other words, the United States Court of Appeals chose not to determine whether market value could be

established by looking at the price paid for guiding services for the hunt in which the wildlife was taken. Nevertheless, the Court did find appropriate the determination of market value as the price the wildlife would bring if sold on the open market between a willing buyer and seller.

In response to the decision in *Stenberg*, 16 U.S.C. Section 3372 was amended in 1988 to include a provision concerning sale and purchase of guiding and outfitting services and invalid licenses and permits. 16 U.S.C. Section 3373(c) provided:

> "(c) **Sale and purchase of guiding and outfitting services and invalid licenses and permits**
>
> (1) **Sale**
>
> It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other

consideration to offer or provide --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) Purchase

It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

> for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife." 16 U.S.C. Section 3373(c)(1)(A), (B)."

It is critical to an understanding of Mr. Atkinson's argument that the amendments which were the result of the *Stenberg* decision concerned only the substantive offense as described in Section 3372, and there were no corresponding amendments to the penalty provisions set forth in Section 3373. Nevertheless, the United States of America attempted to do what Congress refused or failed to do by arguing that market value may be determined by looking to the money paid for guiding or outfitting services or the money paid for a hunting or fishing license. However, the penalty provisions as set forth in Section 3373 were not amended to include this rather expansive definition

of "market value." As stated by the Court in *Stenberg* one of the oldest and most settled rules of statutory construction is the principal that criminal laws are to be strictly construed. See *Busic v. United States*, 446 U.S. 398 (1980). Therefore, even though Congress was aware of the special problems created by the sale of guiding and outfitting services it chose not to amend the penalty provisions of Section 3373. As a result, although Mr. Atkinson clearly agrees that the sale of guiding and outfitting services may not be a violation of the Lacey Act if all other elements are proven, the price paid for guiding and outfitting services cannot be used in determining the "market value" of the wildlife sold.

2. Whether the jury instruction providing for two methods in determining the "market value" of

wildlife was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution?

If this Honorable Court determines that it is proper to construe 16 U.S.C. Section 3373 so as to permit the price paid for guiding services to be used in determining the market value of the wildlife, then the question becomes whether the jury instruction given at the trial of this case providing for two methods in determining "market value" was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution. In this particular case, Instruction No. 50 sets forth the two methods by which the "market value" of the wildlife may be determined and stated:

> "The market value of wildlife may be established by several methods.

> One method is, of course, the price a piece of property would bring if sold on the open market between a willing buyer and seller.
>
> Another method to establish market vlaue is the price paid for guiding services for the hunt in which the wildlife was taken.
>
> Either of the above methods is a proper method to use in determining market value."

This instruction, identical to that given in *Stenberg*, was proposed by the Government and was objected to by counsel for Mr. Atkinson.

In order to understand the question presented by the Petitioner, it is important to point out what language from the instruction is objectionable, and what language is not objectionable. First, Mr. Atkinson did

not at the time of trial and does not now object to the definition of "market value" as the "price a piece of property would bring if sold on the open market between a willing buyer and seller." On the other hand, the language which is objectionable is that "market value" is defined as "the price paid for guiding services for the hunt in which the wildlife was taken." It is precisely this language which Mr. Atkinson contends is vague and ambiguous. One may ask, how so? Such a question is best answered by asking a series of follow up questions which include: What does "price paid for guiding services for the hunt" mean? Does that mean the total fee paid by the hunter? Should the cost of lodging be deducted from the fee because it is not "guiding services"? Should the amount paid for meals and ground transportation be deducted because they are not "guiding services"? If the hunter

goes on two separate hunts and kills two deer, is the amount paid for the guiding services divided by two? If the hunter is guided by two guides, is the price paid for guide services again divided by two? And, is the amount paid by the hunter for licenses, airline tickets, and taxidermy to be included in the "price paid for guiding services"? These are not remote or farfetched questions, but rather are precisely the questions a competent juror would have asked himself or herself during deliberations in the Atkinson case. At the same time, the instruction offers the juror no guidance whatsoever in answering these questions.

It has been stated time and again that the Court must explain all terms of legal significance. See *United States v. Anderton*, 629 F.2d 1044, 1049 and n.5 (5th Cir. 1980). It is undisputed that the jurisdictional amount of Three Hundred Fifty and No/100ths

($350.00) Dollars is, indeed, significant in light of the fact that criminal sanctions are imposed only if the "market value" exceeds Three Hundred Fifty and No/100ths ($350.00). While providing the jury a definition on essential elements is designed to reduce uncertainty, just the opposite occurred here. The United States Court of Appeals for the Ninth Circuit in *U.S. v. Combs*, 762 F.2d 1343 (9th Cir. 1985) addressed a somewhat similar situation and stated at page 1346:

> "It is the duty of the district court to instruct the jury on all the essential elements of the crime charged. *United States v. Bryant*, 461 F.2d 912, 920 (6th Cir. 1972). *See also United States v. Mastelotto*, 717 F.2d 1238, 1248 (9th Cir. 1983). When a person is prosecuted under a statute, the requirements of the statute should be explained to the jury so that they may determine whether or not

the defendant's conduct fits within the statute. *Bryant,* 461 F.2d at 920; *Morris v. United States*, 156 F.2d 525, 529, 531 (9th Cir. 1946). 'A jury may not justifiably find a verdict until they are instructed on the law, sufficiently to show them what is necessary for proof.' *Morris*, 156 F.2d at 531. The court's instruction in this case was so lacking in explanation of the offense charged and its elements that it was fundamentally erroneous and inadequate. *Id. Cf. United States v. Ramsey*, 291 F.2d 737, 739 (6th Cir.) *cert. denied*, 368 U.S. 899, 82 S.Ct. 177, 7 L.Ed.2d 94 (1961).

By merely instructing the jury that Combs would be guilty of the crime charged in Count One if he possessed a rifle with a barrel of less than 16 inches and had made that rifle into a rifle having a barrel of less than 16 inches, the court incorrectly defined the

offense actually charged in Count One. The court substantially amended the indictment through its instructions to the jury and thus '"destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury."' *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (quoting *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960). The court broadened the possible basis for conviction in its instruction, and this constitutes reversible error. *United States v. Miller*, _____ U.S. ____, _____, 105 S.Ct. 1811, 1815, 85 L.Ed.2d 99 (1985). The court thus erred in rejecting Combs' proposed instructions. *See United States v. Tille*, 729 F.2d 615, 624 (9th Cir. 1984) (no error in rejecting requested instructions where court's instructions addressed all elements); *United States v. Lane*, 708

> F.2d 1394, 1397-98 (9th Cir. 1983)
>
> The court had no discretion to refuse to define the crime charged in terms of the very statutes whose violation constituted the crime. *See Morris*, 156 F.2d at 531-32. Without finding that Combs had violated sections 5821 or 5822, the jury could not properly return a guilty verdict under Count One."

Here, Instruction No. 50 did not serve to clarify "market value", but rather it was so lacking in explanation or standards by which to determine "market value" that it violated Mr. Atkinson's Fifth Amendment right to be tried only on charges presented in an Indictment and his right to due process of law and his Sixth Amendment right to be informed of the nature and cause of the accusation against him.

The Government would obviously argue that even if one theory or definition of "market value" was impermissible, any instructional error is harmless and Mr. Atkinson's convictions should stand because there remained a proper theory or definition of "market value" upon which the jury could base its verdict. Such an argument was addressed very clearly by the United States Court of Appeals in *United States v. Wentz*, 800 F.2d 1325 (4th Cir. 1986). In *Wentz*, the Defendant was charged under the National Stolen Property Act in connection with the theft of a boat. One element of these crimes is that the stolen property must have a value of at least Five Thousand and No/100ths ($5,000.00) Dollars. Following his conviction, Mr. Wentz contended that the trial judge improperly instructed the jury to consider not only the market value of the boat, but also its replacement value, a

measure that the Act does not permit. The Court addressed the argument of Mr. Wentz at page 1326 of its opinion and stated:

> "In the jury instruction that Wentz complains of, the court explained that the $5,000 value was an essential element of the offense. It then explained that value ordinarily means market value, that is the price a willing buyer would pay to a willing seller. Now if there is no testimony to support market value for the property, the jury is permitted to consider other reasonable methods of valuation, and among those other reasonable methods of valuation are such items as replacement value less the amount of depreciation that occurred during the time that the property was in the possession of its owner.
>
> The second measure of value, replacement value

less depreciation, would best have been left unsaid. Its meaning is not clear to us, nor could it have been clear to the jury. It may be akin to, if not the same as, the definition of value given in the Act. Whatever its meaning, its inclusion was neither necessary nor helpful.

We do not think, however, that the reference to 'replacement value less depreciation' in this instruction constitutes reversible error. The judge made clear to the jury that the customary measure of value was indeed market value. Market value was correctly defined for the jury. Most importantly, the court directed the jury to consider the alternative measure only if there was no testimony supporting market value. In fact, the jury received extensive testimony concerning market value. Two witnesses, the manager of a

> Bayliner dealership and a representative of the firm that insured the boat, testified that the boat had a market value over $5,000, testimony that made unnecessary the jury's consideration of any other method. Where evidence of replacement value was introduced apart from market value, the judge sustained defendant's objections, noting, 'What is relevant in this case is the fair market value of the boat immediately before the loss.' The only instance of testimony on replacement value permitted was where the witness 'made his explanation that that was about two thousand more' than the actual value of the boat."

In other words, the Court in *Wentz* found that the second measure of value was neither necessary nor

helpful, but the evidence was sufficient to convict Mr. Wentz using the first measure of market value.

In Mr. Atkinson's case, if the second method of determining "market value" was impermissible, was there sufficient evidence to convict Mr. Atkinson using the first method, namely the price a piece of property would bring if sold on the open market between a willing buyer and seller. Nearly all of the testimony regarding the price paid between a willing buyer and a willing seller was presented by Mr. Joel Scrafford, Resident Agent for the United States Fish and Wildlife Service. In that regard Agent Scrafford noted that none of the deer were of trophy status. He further testified that at wildlife sales conducted by Fish and Game, the entire animal was sold for approximately Thirty-five and No/100ths ($35.00) to One Hundred Fifty and No/100ths ($150.00) Dollars. This was really

the only testimony regarding "market value" using the first method. Obviously, there is not sufficient evidence to sustain the jurisdictional amount of Three Hundred Fifty and No/100th ($350.00) Dollars.

It should also be noted that Mr. Scrafford also presented what could be termed a third method of determining "market value" when he testified as to replacement cost. In that regard, he testified that it was appropriate to look at license fees, guide fees, airline transportation, taxidermy fees, cost of cold weather equipment, coats, and packs and miscellaneous food. Such a replacement cost has a low of Two Thousand Two Hundred Sixty and No/100ths ($2,260.00) Dollars and a high of Three Thousand Two Hundred and No/100ths ($3,200.00) Dollars for replacement value. Such testimony only adds to the confusion already generated by the ambiguous and

broad definition of "market value" set forth in the second method. When all of the facts are considered, the only conclusion is that Instruction No. 50 is vague and ambiguous and violates Mr. Atkinson's constitutional rights. Second, the evidence was insufficient, unlike *Wentz*, to sustain this crucial element when only the proper method for determining "market value" is used, namely the price a piece of property would bring if sold on the open market between a willing buyer and seller. The jury could not return a verdict of guilty on any of the 21 counts.

3. Whether the application to the Petitioner of Amendment Number 407 of Section 2Q2.1 of the Federal Sentencing Guidelelines violated the Ex Post Facto Clause of the United States Constitution?

At the sentencing of Mr. Atkinson, the District Court applied Section 2Q2.1 of the Federal Sentencing Guidelines to determine the offense level for Mr. Atkinson. Section 2Q2.1 provides a base offense level of six. To the base offense level, the Court added two levels if the offense involved a commercial purpose pursuant to Section 2Q2.1(b)(1). Mr. Atkinson did not object to that particular increase. However, the District Court also increased the offense level by four levels in applying Section 2Q2.1(b)(3)(A) which provides:

> "If the market value of the specially protected fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in section 2F1.1 (Fraud and Deceit)"

The District Court went on to find that the market value of the wildlife was One Thousand Five Hundred and No/100ths ($1,500.00) Dollars for each of the 14 deer for a total of Twenty-one Thousand and No/100ths ($21,000.00) Dollars. Referring to the tables set forth in Section 2F1.1 (Fraud and Deceit), the offense level was increased four levels.

On appeal before the United States Court of Appeals for the Ninth Circuit, Mr. Atkinson argued that deer are not "specially protected fish, wildlife, or plants" as required by Section 2Q2.1(b)(3)(A). To assist the Court in understanding the significance of the "specially protected" language, Mr. Atkinson provided a brief history of this particular guideline.

Prior to November 1, 1989, there were two separate and distinct sentencing guidelines dealing with conservation and wildlife. Section 2Q2.1 was entitled

Specially Protected Fish, Wildlife, and Plants. One of the specific offense characteristics set forth at Section 2Q2.1(b)(3)(A) stated:

> "If the market value of the specially protected fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in section 2F1.1 (Fraud and Deceit)."

The second guideline to deal with conservation and wildlife prior to November 1, 1989, was Section 2Q2.2 entitled Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants. This particular sentencing guideline made no mention of any "specially protected fish, wildlife, or plants". In other words, prior to November 1, 1989, offenses involving "specially protected" fish, wildlife, and plants would be dealt with in Section 2Q2.1 and offenses involving the

Lacey Act and ordinary fish, wildlife, or plants would be dealt with in Section 2Q2.2. However, on November 1, 1989, these two sentencing guidelines were amended, more specifically, Section 2Q2.2 involving the Lacey Act was deleted and combined into Section 2Q2.1. As a result, when these two sections were amended and combined, the United States Sentencing Commission decided to limit the special offense characteristic dealing with market value to only "specially protected fish, wildlife, or plants." The United States Sentencing Commission chose not to utilize the more general language as set forth in the previous Lacey Act guideline of Section 2Q2.2. Therefore, the special offense characteristic in effect at the time of the commission of the alleged offenses by Mr. Atkinson could only be applied if the offense involved "specially protected fish, wildlife, or plants."

The wildlife in this case do not fall within the definition of "specially protected wildlife."

Nevertheless, the United States Court of Appeals for the Ninth Circuit in its original opinion dated April 27, 1992 applied the specific offense characteristic to Mr. Atkinson as though the language "specially protected" did not exist. Mr. Atkinson filed a timely Petition for Rehearing, and said Petition for Rehearing was denied. Five days later, on July 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its Order and Amended Opinion. The Court affirmed the sentence of Mr. Atkinson, cited Amendment 407 which deleted the langugage "specially protected" from Section 2Q2.1(b)(3)(A) which was effective after Mr. Atkinson's sentencing and stated at page 1276 of its opinion:

"We give substantial deference to a subsequent Guideline amendment 'when it plainly serves to clarify rather than change the existing law.' *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991). It is clear from the commentary to the 1991 amendment that the deletion of the words 'specially protected' clarified, rather than changed, section 2Q2.1(b)(3)(A). U.S.S.G., app. C, amend. 407 (1991) ('this amendment removes language inadvertently retained when this guideline was consolidated with the former 2Q2.2'). This view is also supported by the 1990 commentary to section 2Q2.1(b)(3)(A). As this commentary shows, section 2Q2.1(b)(3)(A) was never intended to apply solely to 'specially protected' wildlife after its consolidation. Rather, it was intended to apply to violations of several different animal protection statutes, including

> the Lacey Act. *See* U.S.S.G. 2Q2.1 commentary (1990) ('[t]his section applies to violations of the . . . Lacey Act'). We therefore conclude there is no distinction between specially protected wildlife and wildlife taken in violation of the Lacey Act under the consolidated version of section 2Q2.1."

Mr. Atkinson contends that the application to Mr. Atkinson of Amendment 407 which deleted the language "specially protected" from Section 2Q2.1 violates the ex post facto clause of the United States Constitution.

Initially, it is important to set forth a brief recitation of the relevant dates in this particular case which is as follows:

1. Effective date of Amendment No. 209 which consolidated Section 2Q2.1 and

Section 2Q2.2 of the Federal Sentencing Guidelines -- November 1, 1989.

2. Dates of the alleged offenses as reflected in the Indictment -- November 6 through November 29, 1989.

3. Date of Imposition of Sentence -- February 8, 1991.

4. Effective date of Amendment No. 407 which deleted the language "specially protected" from Section 2Q2.1(b)(3)(A) -- November 1, 1991.

The United States Court of Appeals in its Amended Opinion attempts to circumvent the ex post facto problem by concluding that the deletion of the language is simply a clarification due to the fact that the explanation to Amendment No. 407 states:

> "This amendment removes language inadvertently retained when this guideline was consolidated with the former section 2Q2.2. The effective date of this

> amendment is November 1, 1991."

Nevertheless, the Sentencing Commission acknowledges that this is not some sort of clarification, but rather it is a deletion or a change. The Sentencing Commission admits that it made a mistake, not a clerical error or a typographical error, but a substantive mistake which requires a specific amendment. It is important to point out that Section 2Q2.1(b)(3)(A) was clear and unambiguous at the time that Mr. Atkinson was sentenced. There was absolutely no need to make reference to any type of commentary whatsoever. Of additional assistance is the decision by the United States Court of Appeals for the Ninth Circuit in *United States v. Martinez*, 946 F.2d 100 (9th Cir. 1991) where the Court stated:

"Here, however, where the circumstances surrounding the relevant guideline and its amendment fail to make clear that the amendment's purpose was merely to clarify rather than to alter pre-existing law, we will confer no weight on the subsequent amendment. *Cf., e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13, 100 S.Ct. 2051, 2061 n. 13, 64 L.Ed.2d 766 (1980) ('[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.'). This is expecially so in the criminal law context where the rule of lenity requires that we infer the rationale most favorable to the appellants and construe the guidelines accordingly."

If this language is applied fairly to Amendment No. 407 which deleted the relevant language "specially protected", then it is obvious that the amendment failed to make clear that the amendment was merely to clarify. If that is the case, then no weight may be conferred on this subsequent Amendment No. 407.

On the other hand, if weight is given to Amendment No. 407, then reference need be made to the decision by the Supreme Court of the United States in *Miller v. Florida*, 482 U.S. 423 (1987). In *Miller*, the Supreme Court of the United States was faced with an amendment made to the sentencing guidelines of the State of Florida. At the time the Defendant committed the sexual battery and the other offenses for which he was later convicted in a Florida Trial Court, the statute provided a presumptive sentence range of three and one-half to four and

one-half years imprisonment. The sentencing guidelines were later revised to increase the number of points assigned to sexual offenses, and at the time the Defendant was sentenced, the guidelines called for a presumptive sentence of five and one-half to seven years in prison. The Judge who sentenced the Defendant applied the amended guidelines and imposed a seven year sentence.

On Certiorari, the United States Supreme Court expressed the unanimous view of the Court that the revised Sentencing Guidelines Statute, as applied to the Defendant, whose crimes occurred before the statute's effective date, violated the ex post facto clause of the Federal Constitution, namely Article I, Section 10. In so holding, the Court utilized the test set forth at 96 L.Ed. 2d 360 which provides:

> "Our test for determining whether a criminal law is ex post facto derives from these principles. As was stated in Weaver, to fall within the ex post facto prohibiton, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' Id., at 29, 67 L Ed 2 17, 101 S Ct 960. We have also held in Dobbert v. Florida, 432 US 282, 53 L Ed 2d 344, 97 S Ct. 2290 (1977), that no ex post facto violation occurs if a change does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'"

Keeping in mind the above quoted language, the first prong is that the law must be retrospective, and it

is deemed retrospective if it changes the legal consequences of acts completed before its effective date. Here, Amendment No. 407 whose effective date was November 1, 1991, and which deleted the language "specially protected", has certainly been applied along with the commentary of the amendment to Mr. Atkinson's offense which was alleged to have been committed in November of 1989. One could argue that the amendment and its commentary were not applied retroactively, rather the Court was simply interpreting the language of the guideline which existed in November of 1989 at the time of the alleged offense. However, the language which existed at the time of the offense, namely November of 1989, did not require interpretation. Rather, what the United States Court of Appeals for the Ninth Circuit did was basically omit or delete language which is precisely what Amendment

407 accomplished. Additionally, the deletion of existing language is precisely what occurred in *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990) in which the United States Court of Appeals for the Fifth Circuit was confronted with an amendment to Section 1B1.3 in which the language of that section was deleted regarding the Defendant's state of mind. The purpose of the amendment was to delete language which was viewed as "unnecessary." The Court found that because the amended section increased the Defendant's punishment, the amendment was not simply a change in procedure which does not affect a matter of substance. Very simply, the Court found that the deletion of the language was a substantive change as opposed to a clarification. Returning to the case at bar, there is no doubt that Amendment No. 407 has been applied to events occurring prior to its effective

date, November 1, 1991. The first prong of the test is satisfied.

The second prong of the test is that the amendment must disadvantage the offender affected by it. Here, the Court's application of Amendment No. 407 resulted in an increase of four levels which resulted in Mr. Atkinson's final offense level of 18, which, together with his criminal history category, resulted in a sentencing range of 30 - 37 months. Mr. Atkinson was then sentenced to 37 months. Had the increase pursuant to Section 2Q2.1(b)(3)(A) only applied to "specially protected" wildlife, Mr. Atkinson's offense level would have been offence level 14 with a sentencing range of 18 - 24 months. As the Court in *Suarez* noted, the change alters the length of time that the Defendant spends in prison. As such, there is no doubt that the deletion of the language "specially

protected" and the application of Amendment No. 407 clearly disadvantaged Mr. Atkinson and the second prong of the test is clearly satisfied.

Once again, when all of the facts and relevant law are considered, the only conclusion that can be drawn is that the application of Amendment No. 407 to Mr. Atkinson violates the ex post facto clause of the Federal Constitution.

CONCLUSION

For the reasons stated and the authorities cited, the Petitioner, Melville O'Neal Atkinson, prays that this Honorable Court grant his Petition for a Writ of Certiorari.

DONE AND DATED this 9th day of December, 1992.

MOSES LAW FIRM
P. O. Box 2533
Billings, Montana 59103

By: _____
Jay F. Lansing

ATTORNEYS FOR
PETITIONER

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

JAY F. LANSING, of legal age, being first duly sworn on his oath, deposes and says that he is the attorney for Petitioner herein, and that he personally has deposited said Petition at the United States Post Office in Billings, Montana, by first class mail, postage prepaid and properly addressed to the Clerk of this

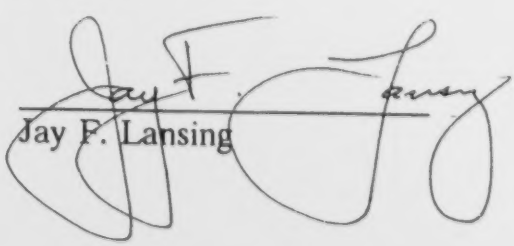
Court on the 9th day of December, 1992, which is timely as within 90 days of the date of denial of Petitioner's Petition for Rehearing by the United States Court of Appeals for the Ninth Circuit on September 10, 1992.

Affiant further states that this Petition was at such times and place served by mail on the Respondent United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies thereof to:

Kris A. McLean
Assistant United States Attorney
Federal Building
Drawer 10031
Helena, Montana 596267



Jay F. Lansing

SUBSCRIBED AND SWORN to before me this

9th day of December, 1992.

Charlotte L. Sears

Notary Public for the State of Montana
Residing at Huntley, MT
My Commission Expires: 1/31/95

92-1170

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

JAY F. LANSING
MOSES LAW FIRM
P. O. Box 2533
Billings, Montana 59103-2533
(406)248-7702

COUNSEL FOR PETITIONER

Table of Contents of Appendix

Order and Amended Opinion of United States Court of Appeals for the Ninth Circuit -- July 22, 1992 A

Opinion of United States Court of Appeals for the Ninth Circuit -- April 27, 1992 B

Order of District Court District of Montana -- November 16, 1990 C

Denial of Petition for Rehearing -- September 10, 1992 D

Denial of Petition for Rehearing -- July 17, 1992 E

Judgment of United States Court of Appeals for the Ninth Circuit -- September 21, 1992 F

District Court Judgment,
District of Montana
-- March 1, 1991 G

Indictment
-- September 4, 1990 H

Constitutional Provisions I

Statutory Provisions J

Federal Sentencing Guideline
Provisions K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MELVILLE O'NEAL ATKINSON, *Defendant-Appellant.*	No. 91-30084 D.C. No. CR-90-48-JDS ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
February 5, 1992—Seattle, Washington

Filed April 27, 1992
Amended July 22, 1992

Before: Procter Hug, Jr., John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Criminal Litigation and Procedure/Juries/Evidence/Sentencing

Affirming a district court judgment of conviction and sentence, the court of appeals held that the jury was properly instructed that, in calculating the value of game illegally taken

in violation of the Lacey Act, it could consider the amount appellant charged his clients to participate in a guided hunt.

Appellant Melville O'Neal Atkinson was convicted of several Lacey Act violations for his role in organizing and guiding several illegal deer hunting expeditions. At trial the jury was required to decide whether the value of the game taken during these illegal hunts exceeded $350, the threshold for determining whether a violation was a felony under the Act. Atkinson argued that the district court erred in allowing the jury to consider the price of his guide services in determining the market value of the deer killed. Atkinson contended that the jury should only have been allowed to consider the market price of the animals' parts in determining their value under the Act.

[1] The market value of wildlife under the Lacey Act is a factual question reserved for the jury. **[2]** A violation of section 3372(c) does not involve a "sale" of game in the traditional sense; rather under that section the commodity being "sold" is the opportunity to illegally hunt game with the assistance of a guide. **[3]** The court rejected the argument that since Montana Code § 87-1-111 requires a person convicted of illegally killing a deer to "reimburse" the state $300, that figure should be conclusive of a deer's market value for purposes of the Act.

[4] The court found unpersuasive Atkinson's argument that the trial court improperly read certain portions of his indictment to the jury; that the court's aiding and abetting instruction was inadequate; and that the court erred by refusing to give two of his proposed jury instructions. **[5]** On the basis of the evidence presented, a reasonable jury could have found that Atkinson conspired to violate the Lacey Act. **[6]** The court also disagreed that the evidence failed to show that Atkinson either sold or transported wildlife in interstate commerce as required under the Act.

[7] The district court properly increased Atkinson's offense level under the Guidelines for committing an offense under the Lacey Act involving wildlife with a market value in excess of $20,000; acting as the organizer of a criminal activity involving five or more participants; and obstructing justice.

COUNSEL

Stephen C. Moses, Moses Law Firm, Billings, Montana, for the defendant-appellant.

Kris A. McLean, Assistant United States Attorney, Helena, Montana, for the plaintiff-appellee.

ORDER

The opinion filed April 27, 1992 is amended as follows:

1. At slip op. 4654, in the second line of the text under SENTENCING GUIDELINES the word "Federal" is deleted and the words "United States" are inserted in lieu thereof.

2. At slip op. 4655, in the third line of the first full paragraph, after the words "Prior to" there is inserted "November 1,".

3. At slip op. 4655, in the first full paragraph, the portion of the paragraph beginning with the words "*See* United States Sentencing Commission," and continuing through to the end of the paragraph which ends "violation of the Lacy Act" are deleted. Inserted in lieu thereof is the following which will continue as part of the paragraph immediately following the sentence which ends "consolidated with section 2Q2.1."

See U.S.S.G., app. C, amend. 209 (1990). Although the consolidated version of section 2Q2.1 initially retained the reference to "specially protected" wildlife, *see* U.S.S.G. § 2Q2.1 (1989), this language was deleted two years later, *see* U.S.S.G. § 2Q2.1 (1991). Atkinson contends that because he was sentenced before the reference to "specially protected" wildlife was deleted in 1991,[7] section 2Q2.1 cannot be used to enhance his sentence. We disagree.

4. Add a new footnote 7 at slip op. 4655 which will provide:

[7]Because Atkinson was sentenced on February 15, 1991, the 1990 version of the Guidelines was still in effect.

5. The following new paragraph is inserted to follow the language set forth above, and which will immediately precede the paragraph at slip op. 4655 that begins "Atkinson argues that even if this section . . .":

We give substantial deference to a subsequent Guideline amendment "when it plainly serves to clarify rather than change the existing law." *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991). It is clear from the commentary to the 1991 amendment that the deletion of the words "specially protected" clarified, rather than changed, section 2Q2.1(b)(3)(A). U.S.S.G., app. C, amend. 407 (1991) ("this amendment removes language inadvertently retained when this guideline was consolidated with the former § 2Q2.2"). This view is also supported by the 1990 commentary to section 2Q2.1(b)(3)(A). As this commentary shows, section 2Q2.1(b)(3)(A) was never intended to apply solely to "specially protected" wildlife after its consolidation. Rather, it was intended to apply to violations of sev-

eral different animal protection statutes, including the Lacey Act. *See* U.S.S.G. § 2Q2.1 commentary (1990) ("[t]his section applies to violations of the . . . Lacey Act"). We therefore conclude there is no distinction between specially protected wildlife and wildlife taken in violation of the Lacey Act under the consolidated version of section 2Q2.1.

6. At slip op. 4655 under part B which is entitled "Sentencing Guideline § 3B1.1(a), in the third and fourth lines of the first paragraph, change "Federal Sentencing Guideline § 3B1.1(a)" to "U.S.S.G. § 3B1.1(a) (1990)."

7. At slip op. 4656, top line of the text, change "Federal Sentencing Guideline § 3B1.1 (Application Note 1)" to "U.S.S.G. § 3B1.1, application note 1 (1990)".

OPINION

THOMPSON, Circuit Judge:

Melville O'Neal Atkinson was convicted of twenty-one felony violations of the Lacey Act for his role in organizing and guiding several illegal hunting expeditions. 16 U.S.C. §§ 3372(a)(1)(A), 3372(c)(1).

At trial, the jury was required to decide whether the value of the game taken during these illegal hunts exceeded $350, the threshold for determining whether a violation constitutes a felony under the Act. 16 U.S.C. § 3373(d)(1)(B). The jury was instructed that, in calculating the value of the game, it could consider the amount Atkinson charged his clients to participate in a hunt. Atkinson's fee ranged from $1,500 to $3,000 per hunter.

Atkinson appeals, arguing that the jury should only have been allowed to consider the market price of the animals'

parts in determining their value under the Act. He also challenges his conviction and sentence on a number of alternate grounds. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2) and we affirm.

FACTUAL BACKGROUND

Atkinson owned and operated Neal's Wilderness Outfitters, Inc., a Jacksonville, Florida business which organized deer hunting expeditions in the State of Montana. He charged a base fee of $1,500 to participate in a hunt. In return, he provided meals, lodging and guide services. He also promised to supply each hunter with a valid Montana state hunting license.

Atkinson split his outfitting fee with Wayne Bacon and Brian Nelson. In return, Bacon and Nelson let the hunters stay at their Montana ranch. They also helped Atkinson guide the hunts.

During November 1989, Atkinson arranged for three separate hunting expeditions. He took three hunters on the first trip. Atkinson charged each of them the standard $1,500 outfitting fee, plus $200 for a Montana state hunting license. He also charged an additional $500 for a special "outfitters tag," which he claimed would allow each of them to kill a second deer.[1] Atkinson never obtained licenses for the hunters, nor did he provide them with any special hunting tags. Despite his knowledge that the hunters were violating Montana law by hunting without licenses, *see* Montana Code § 87-2-103, he proceeded to guide them on a series of illegal hunts.

The hunters killed a total of three deer during the trip. Two of these were taken at night with the aid of a spotlight, also in violation of Montana law. Montana Code § 87-3-101. After

[1]Under Montana Code § 87-3-103, a hunting license allows its holder to take one game animal per year unless special authorization is obtained from the Montana Department of Fish, Wildlife and Parks.

the hunt, Atkinson arranged to ship all three deer back to Florida.

Later that month, Atkinson took five more hunters to Montana. He charged them each an outfitting fee of $1,600, plus $200 for a Montana state hunting license. Each hunter also agreed to pay Atkinson an additional $800 if he killed a second deer.

All but one of the hunters received a valid license. Atkinson arranged for that hunter to use a fake license. Atkinson also provided three of the hunters with additional deer tags. These tags allowed each of them to kill one doe in addition to the buck they were already licensed to take. Atkinson instructed them to use the doe tag on their first kill, regardless of the deer's sex, in order to save their buck tags for a later hunt. Montana law makes it illegal to improperly tag game. Montana Code § 87-2-509.

Each of the three hunters killed a large buck and, as Atkinson had instructed, tagged it with their doe tag. One of the hunters also killed a deer during an illegal nighttime hunt. At the end of the hunt, Atkinson again arranged to ship the deer back to the hunters' homes in Florida and Georgia.

Atkinson accompanied John Campbell and Charles Brown on the third hunt. Each paid an outfitting fee,[2] plus an additional $200 for a hunting license. Although Atkinson never provided these licenses, he assured both hunters that because there were so few game wardens in the area, he was sure they would "get away with it."

Campbell killed a deer on the first day of the hunt. Brown killed two deer a few days later. Because Brown lacked a

[2]Brown testified that he actually paid Atkinson between $1,800 and $2,000 for arranging the trip. Campbell apparently traded Atkinson auto body work worth between $2,500 and $2,800 for his spot in the hunt.

valid deer tag, Bacon, the ranch owner who also served as a guide, agreed to place one of his own tags on Brown's second kill. Brown paid Atkinson an additional $200 for this tag. After the hunt, Atkinson arranged for Campbell to illegally purchase another hunter's unused tag so he could ship his deer back to Florida.

The Montana Department of Fish, Wildlife and Parks eventually became aware of Atkinson's activities. As a result, the Department arranged for South Carolina State Conservation Officers Larry McClain and Tommy Norris to book a hunting trip with Atkinson's agency. Although both officers paid the standard $1,500 outfitting fee, neither was charged for, or received, a Montana state hunting license. Atkinson told Norris to buy a bird-hunting license, in case he was stopped by a game warden.[3]

During the hunt, each officer killed one deer. Norris placed Nelson's deer tag on his kill because he did not have a tag of his own. At Atkinson's direction, Norris later paid Nelson $200 for the tag. After the hunt, McClain paid Atkinson an additional $100 to ship his deer back to South Carolina.

Atkinson was eventually arrested by Montana state game wardens and charged with twenty-three violations of the Lacey Act. Bacon and Nelson both testified against Atkinson at trial, as did a number of Atkinson's former clients. Atkinson was convicted of twenty-one violations of the Act and sentenced to thirty-seven months in federal prison. This appeal followed.

[3]When McClain originally booked his trip, he told Atkinson that he already possessed a fake Montana state hunting license. During the trip, he and Atkinson joked about the fact that McClain was hunting under a bogus license. At trial, Bacon testified that Atkinson had also arranged for Norris to use a license issued in the name of Mike Key.

VALUATION

The Lacey Act makes it unlawful to sell or transport in interstate commerce wildlife taken in violation of state law. 16 U.S.C. § 3372(a)(2)(A). Under this section, a person "sells" wildlife in violation of the Act whenever, for money or other consideration, he offers or provides "guiding, outfitting, or other services" or "a hunting or fishing license or permit" for the illegal taking of wildlife. 16 U.S.C. 3372(c)(1).[4] A violation of section 3372 is punishable by five years imprisonment, a fine of $20,000, or both, provided the market value of the animals sold exceeded $350. 16 U.S.C. § 3373(d)(1)(B).

[1] The market value of wildlife under the Lacey Act is a factual question reserved for the jury. *Stenberg*, 803 F.2d at 433. The trial judge instructed the jury that it could determine the market value of the deer sold by Atkinson either by the price each deer would bring if sold on the open market (less than $150 each in this case), or by the "price paid for guiding services for the hunt in which the wildlife was taken." Atkinson argues that the court erred in allowing the jury to consider the price of his guide services in determining the market value of the deer.

United States v. Todd, 735 F.2d 146 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985), is the only case directly addressing the method for determining the market value of an animal killed during a guided hunt. Todd was a commercial

[4]In *United States v. Stenberg*, 803 F.2d 422 (9th Cir. 1986), we held that the sale of wildlife under the Lacey Act did not encompass the sale of guide services. The Act was amended in 1988 to include section 3372(c). Pub. L. 100-653, § 101(3), 102 Stat. 3825 (1988). The express purpose of this amendment was to overturn our holding in *Stenberg*. *See* S. Rep. No. 100-563, 100th Congress, 2d Sess. 9-10 ("This amendment would overturn the decision in *United States v. Stenberg* [citation omitted], which held that . . . the term 'sale of wildlife' does not include the provision of guiding services."), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5374.

guide who specialized in arranging illegal airborne hunts. He charged between $1,000 and $5,000 for his services. Todd appealed his conviction under the Lacey Act, arguing that the trial court improperly considered the cost of his guide services in calculating the market value of the animals killed by his clients. The Fifth Circuit held that because an offer to provide guide services is an offer to sell wildlife under the Act, "[t]he best indication of the value of the game 'sold' in this manner is the price of the hunt." *Id.* at 152. *Todd* was decided before the Lacey Act was amended to include section 3372(c). Consistent with section 3372(c), we conclude that *Todd* sets forth the proper method for valuing game taken on a guided hunt.

[2] A violation of section 3372(c) does not involve a "sale" of game in the traditional sense; rather, under section 3372(c) the commodity being "sold" is the opportunity to illegally hunt game with the assistance of a guide. *See Stenberg,* 803 F.2d at 436 (an ordinary person would view the sale of guiding services "as providing the buyer the opportunity to kill wildlife, . . . [not] an actual sale of the wildlife itself"). As a result, the value of an animal taken in a guided hunt bears little relation to the market price of its parts. Instead, as the Fifth Circuit recognized in *Todd,* its market value is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt. *Todd,* 735 F.2d at 152.

Atkinson relies on *Stenberg* to support his contention that an animal's market value under the Act can only be determined by the aggregate value of its parts on the open market. In *Stenberg,* the trial court had allowed the jury to consider the cost of guide services in calculating the market value of game killed during a hunt. *Stenberg,* 803 F.2d at 432. Stenberg argued that this was an improper method for determining an animal's market value under the Lacey Act. We never resolved the valuation issue, because we concluded that an offer to provide guide services was not a "sale" under the Act. *Id.* at 437. Consequently, *Stenberg* offers little guidance on

the proper method for determining the market value of an animal taken during a guided hunt.

[3] Atkinson also suggests an alternate method for determining market value in this case. Montana Code § 87-1-111 requires a person convicted of illegally killing a deer to "reimburse" the state $300. Atkinson argues that this figure should be conclusive of a deer's market value for purposes of the Act. We reject this argument. Atkinson has produced no evidence that Montana intended section 87-1-111 to define the market value of deer taken in violation of state law. Nor do the fines established under this code section appear to bear any resemblance to the actual market values of the animals listed.

JURY INSTRUCTIONS

[4] Atkinson raises three more challenges to the district court's jury instructions. First, he argues that the trial court improperly read certain portions of his indictment to the jury. Second, he claims that the court's aiding and abetting instruction was inadequate. Finally, he contends that the court erred by refusing to give two of his proposed jury instructions. None of these arguments is persuasive.

A. Indictment

The decision to read an indictment to the jury is within the sound discretion of the trial court. *United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). Given the complexity of this case, the court did not abuse its discretion when it attempted to clarify the charges against Atkinson by reading them directly from the indictment.

B. Aiding and Abetting Instructions

Atkinson also argues the trial court's instructions failed to inform the jury that they could convict Atkinson of aiding and

BEST AVAILABLE COPY

abetting only if they first found he assisted in the commission of a crime.

"When reviewing a claim of error relating to jury instructions, the instructions must be viewed as a whole." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984). Here, the court gave the jury a number of instructions outlining the elements necessary to convict Atkinson of aiding and abetting. When read together, these instructions clearly informed the jury they could convict Atkinson only if they found he took some affirmative step to assist in the commission of a crime. This was sufficient.

C. Atkinson's Proposed Instructions

Atkinson proposed two additional jury instructions. First, he asked for an instruction clarifying the meaning of "taking game" under Montana law. Second, he sought an instruction on the requirements for tagging deer in Montana. He contends that the trial court erred in refusing to give either of these proposed instructions.

"A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence." *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985). Here, neither instruction was relevant to the issues presented at trial. Consequently, the trial court did not err in rejecting them.[5]

SUFFICIENCY OF THE EVIDENCE

Atkinson argues that the evidence presented was insufficient to support his convictions for conspiring to violate the

[5]Although the standard for reviewing the denial of a proposed jury instruction is unsettled in this circuit, *United States v. Sotelo-Murillo*, 887 F.2d 176, 179-80 (9th Cir. 1989), our conclusion in this case is the same under either a de novo or abuse of discretion standard.

Lacey Act. He also contends that the evidence failed to show he sold or transported wildlife in interstate commerce as required under the Act.

In deciding whether evidence is sufficient to support a conviction, we examine the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A. Conspiracy

"The elements of [a] conspiracy are (1) an agreement to accomplish an illegal objective, (2) coupled with one or more acts in furtherance of the illegal purpose, and (3) the requisite intent to commit the underlying substantive offense." *United States v. Pemberton*, 853 F.2d 730, 733 (9th Cir. 1988). The agreement giving rise to a conspiracy need not be explicit. *United States v. Thomas*, 887 F.2d 1341, 1347 (9th Cir. 1989).

There was ample evidence of a conspiracy among Atkinson, Bacon and Nelson. Bacon and Nelson expressly agreed with Atkinson to provide guide services for unlicensed hunters. Further, they agreed to sell their own deer tags to these hunters in violation of Montana law.

Atkinson also conspired with the hunters who accompanied him to Montana. Atkinson agreed to guide these hunters knowing they were not legally authorized to hunt game. On the few occasions he was questioned about the need for hunting licenses, he either arranged to provide the hunters with fake licenses or encouraged them to hunt without licenses. He also agreed to conduct illegal nighttime hunts. Finally, he plotted with at least three hunters to unlawfully mistag their kills.

[5] Given this evidence, a reasonable jury could have found that Atkinson conspired to violate the Lacey Act.

B. Interstate Transport

[6] Atkinson also argues the evidence failed to show he either sold or transported wildlife in interstate commerce as required under the Act. *See* 16 U.S.C. § 3372(a)(2)(A). We disagree.

At the end of each hunt, Atkinson either arranged to ship the deer carcasses to hunters' homes outside the State of Montana, or assisted the hunters in these shipments. This satisfies the Act's interstate commerce requirement. *See United States v. Gay-Lord*, 799 F.2d 124, 126 (4th Cir. 1986) (Lacey Act satisfied when defendant "knew that [wildlife] would be transported in interstate commerce and took the steps that began their travel to interstate markets").[6]

SENTENCING GUIDELINES

[7] Atkinson argues that the district court improperly increased his base offense level under the United States Sentencing Guidelines for: (1) committing an offense under the Lacey Act involving wildlife with a market value in excess of $20,000 (section 2Q2.1); (2) acting as the organizer of a criminal activity involving five or more participants (section 3B1.1); and (3) obstructing justice (section 3C1.1).

A. Sentencing Guideline § 2Q2.1

Sentencing Guideline § 2Q2.1(b)(3)(A) provides for an increase in a defendant's base offense level for smuggling or unlawfully dealing in wildlife with a market value greater than $2,000. The amount of this increase is determined by reference to the table at section 2F1.1. When the market value

[6]The indictment did not charge, nor does the government contend, that Atkinson violated the Lacey Act by arranging for the hunters to cross state lines to hunt deer. Accordingly, we do not consider whether this would satisfy the Act's interstate commerce requirement.

of game exceeds $20,000, the table requires an increase of four levels. The district court found that the aggregate market value of the deer in this case was $21,000.

Atkinson argues that section 2Q2.1 is inapplicable because deer are not "specially protected" wildlife. He also contends that even if deer are specially protected, the market value of the deer taken did not justify the four-level increase imposed by the trial court.

Atkinson's argument that section 2Q2.1 does not apply to "ordinary" wildlife taken in violation of the Lacey Act is contrary to the history of the section. Prior to November 1, 1989, the Guidelines contained two seperate provisions dealing with the unlawful sale of wildlife. Section 2Q2.1 expressly applied only to "specially protected" animals, while section 2Q2.2 applied to all violations of the Lacey Act. On November 1, 1989, section 2Q2.2 was deleted and consolidated with section 2Q2.1. *See* U.S.S.G., app. C, amend. 209 (1990). Although the consolidated version of section 2Q2.1 initially retained the reference to "specially protected" wildlife, *see* U.S.S.G. § 2Q2.1 (1989), this language was deleted two years later, *see* U.S.S.G. § 2Q2.1 (1991). Atkinson contends that because he was sentenced before the reference to "specially protected" wildlife was deleted in 1991,[7] section 2Q2.1 cannot be used to enhance his sentence. We disagree.

We give substantial deference to a subsequent Guideline amendment "when it plainly serves to clarify rather than change the existing law." *United States v. Martinez,* 946 F.2d 100, 102 (9th Cir. 1991). It is clear from the commentary to the 1991 amendment that the deletion of the words "specially protected" clarified, rather than changed, section 2Q2.1(b)(3)(A). U.S.S.G., app. C, amend. 407 (1991) ("this amendment removes language inadvertently retained when this guideline

[7]Because Atkinson was sentenced on February 15, 1991, the 1990 version of the Guidelines was still in effect.

was consolidated with the former § 2Q2.2"). This view is also supported by the 1990 commentary to section 2Q2.1(b)(3)(A). As this commentary shows, section 2Q2.1(b)(3)(A) was never intended to apply solely to "specially protected" wildlife after its consolidation. Rather, it was intended to apply to violations of several different animal protection statutes, including the Lacey Act. *See* U.S.S.G. § 2Q2.1 commentary (1990) ("[t]his section applies to violations of the . . . Lacey Act"). We therefore conclude there is no distinction between specially protected wildlife and wildlife taken in violation of the Lacey Act under the consolidated version of section 2Q2.1.

Atkinson argues that even if this section applies, the market value of the deer in this case did not warrant a four-level increase in his sentence. The district court calculated the market value of the deer by multiplying Atkinson's standard outfitting fee ($1,500) by the number of deer killed (14). The result was a total market value of $21,000. As the district court correctly concluded, this corresponds to a four-level increase under section 2F1.1.

B. Sentencing Guideline § 3B1.1(a)

Atkinson's sentence was enhanced four levels because the trial court found he "organize[d] . . . a criminal activity that involved five or more participants. . . ." U.S.S.G. § 3B1.1(a) (1990). Atkinson argues that his sentence was improperly increased under this section because none of the hunters qualified as a "participant."

For purposes of section 3B1.1, "[a] 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1 application note 1 (1990); *see also United States v. Anderson*, 942 F.2d 606, 615 (9th Cir. 1991) ("participant" under section 3B1.1 means "criminally responsible person").

Each of the hunters was criminally responsible for illegally buying game in violation of the Lacey Act. *See* 16 U.S.C.

§ 3372(c)(2)(A) (buying guiding, outfitting or other services is a "purchase of wildlife" under the Act). Thus, even though none of the hunters was prosecuted, all twelve of them qualified as "participants" under Guideline section 3B1.1(a).

Finally, each of the four hunts involved Atkinson,[8] Wayne Bacon and Brian Nelson (the two guides/ranch owners), as well as at least two hunters. Thus, even if the four hunts are viewed as separate criminal activities, each involved five or more participants.

C. Sentencing Guideline § 3C1.1

The district court also increased Atkinson's sentence because it found he obstructed justice by instructing Campbell and Brown to lie to federal agents during the investigation. Under section 3C1.1, a two-level increase is warranted where a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation. . . ."

Campbell testified that Atkinson contacted him several weeks after the hunt and told him not to speak with the police about his trip to Montana. Atkinson also helped Campbell concoct a story to tell the authorities if he was forced to discuss the hunt. He instructed Brown in the same manner.

The district court did not err in determining that Atkinson obstructed justice under section 3C1.1.

CONCLUSION

We affirm the appellant's conviction and sentence on all counts.

---

[8]The defendant may be considered in calculating the total number of participants for purposes of section 3B1.1. *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MELVILLE O'NEAL ATKINSON, *Defendant-Appellant.*	No. 91-30084 D.C. No. CR-90-48-JDS OPINION

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
February 5, 1992—Seattle, Washington

Filed April 27, 1992

Before: Procter Hug, Jr., John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Criminal Litigation and Procedure/Juries/Evidence/Sentencing

Afffirming a district court judgment of conviction and sentence, the court of appeals held that the jury was properly instructed that, in calculating the value of game illegally taken in violation of the Lacey Act, it could consider the amount appellant charged his clients to participate in a guided hunt.

Appellant Melville O'Neal Atkinson was convicted of several Lacey Act violations for his role in organizing and guiding several illegal deer hunting expeditions. At trial the jury was required to decide whether the value of the game taken during these illegal hunts exceeded $350, the threshold for determining whether a violation was a felony under the Act. Atkinson argued that the district court erred in allowing the jury to consider the price of his guide services in determining the market value of the deer killed. Atkinson contended that the jury should only have been allowed to consider the market price of the animals' parts in determining their value under the Act.

[1] The market value of wildlife under the Lacey Act is a factual question reserved for the jury. **[2]** A violation of section 3372(c) does not involve a "sale" of game in the traditional sense; rather under that section the commodity being "sold" is the opportunity to illegally hunt game with the assistance of a guide. **[3]** The court rejected the argument that since Montana Code § 87-1-111 requires a person convicted of illegally killing a deer to "reimburse" the state $300, that figure should be conclusive of a deer's market value for purposes of the Act.

[4] The court found unpersuasive Atkinson's argument that the trial court improperly read certain portions of his indictment to the jury; that the court's aiding and abetting instruction was inadequate; and that the court erred by refusing to give two of his proposed jury instructions. **[5]** On the basis of the evidence presented, a reasonable jury could have found that Atkinson conspired to violate the Lacey Act. **[6]** The court also disagreed that the evidence failed to show that Atkinson either sold or transported wildlife in interstate commerce as required under the Act.

[7] The district court properly increased Atkinson's offense level under the Guidelines for committing an offense under the Lacey Act involing wildlife with a market value in excess

of $20,000; acting as the organizer of a criminal activity involving five or more participants; and obstructing justice.

COUNSEL

Stephen C. Moses, Moses Law Firm, Billings, Montana, for the defendant-appellant.

Kris A. McLean, Assistant United States Attorney, Helena, Montana, for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

Melville O'Neal Atkinson was convicted of twenty-one felony violations of the Lacey Act for his role in organizing and guiding several illegal hunting expeditions. 16 U.S.C. §§ 3372(a)(1)(A), 3372(c)(1).

At trial, the jury was required to decide whether the value of the game taken during these illegal hunts exceeded $350, the threshold for determining whether a violation constitutes a felony under the Act. 16 U.S.C. § 3373(d)(1)(B). The jury was instructed that, in calculating the value of the game, it could consider the amount Atkinson charged his clients to participate in a hunt. Atkinson's fee ranged from $1,500 to $3,000 per hunter.

Atkinson appeals, arguing that the jury should only have been allowed to consider the market price of the animals' parts in determining their value under the Act. He also challenges his conviction and sentence on a number of alternate grounds. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2) and we affirm.

FACTUAL BACKGROUND

Atkinson owned and operated Neal's Wilderness Outfitters, Inc., a Jacksonville, Florida business which organized deer hunting expeditions in the State of Montana. He charged a base fee of $1,500 to participate in a hunt. In return, he provided meals, lodging and guide services. He also promised to supply each hunter with a valid Montana state hunting license.

Atkinson split his outfitting fee with Wayne Bacon and Brian Nelson. In return, Bacon and Nelson let the hunters stay at their Montana ranch. They also helped Atkinson guide the hunts.

During November 1989, Atkinson arranged for three separate hunting expeditions. He took three hunters on the first trip. Atkinson charged each of them the standard $1,500 outfitting fee, plus $200 for a Montana state hunting license. He also charged an additional $500 for a special "outfitters tag," which he claimed would allow each of them to kill a second deer.[1] Atkinson never obtained licenses for the hunters, nor did he provide them with any special hunting tags. Despite his knowledge that the hunters were violating Montana law by hunting without licenses, *see* Montana Code § 87-2-103, he proceeded to guide them on a series of illegal hunts.

The hunters killed a total of three deer during the trip. Two of these were taken at night with the aid of a spotlight, also in violation of Montana law. Montana Code § 87-3-101. After the hunt, Atkinson arranged to ship all three deer back to Florida.

Later that month, Atkinson took five more hunters to Montana. He charged them each an outfitting fee of $1,600, plus

[1]Under Montana Code § 87-3-103, a hunting license allows its holder to take one game animal per year unless special authorization is obtained from the Montana Department of Fish, Wildlife and Parks.

BEST AVAILABLE COPY

$200 for a Montana state hunting license. Each hunter also agreed to pay Atkinson an additional $800 if he killed a second deer.

All but one of the hunters received a valid license. Atkinson arranged for that hunter to use a fake license. Atkinson also provided three of the hunters with additional deer tags. These tags allowed each of them to kill one doe in addition to the buck they were already licensed to take. Atkinson instructed them to use the doe tag on their first kill, regardless of the deer's sex, in order to save their buck tags for a later hunt. Montana law makes it illegal to improperly tag game. Montana Code § 87-2-509.

Each of the three hunters killed a large buck and, as Atkinson had instructed, tagged it with their doe tag. One of the hunters also killed a deer during an illegal nighttime hunt. At the end of the hunt, Atkinson again arranged to ship the deer back to the hunters' homes in Florida and Georgia.

Atkinson accompanied John Campbell and Charles Brown on the third hunt. Each paid an outfitting fee,[2] plus an additional $200 for a hunting license. Although Atkinson never provided these licenses, he assured both hunters that because there were so few game wardens in the area, he was sure they would "get away with it."

Campbell killed a deer on the first day of the hunt. Brown killed two deer a few days later. Because Brown lacked a valid deer tag, Bacon, the ranch owner who also served as a guide, agreed to place one of his own tags on Brown's second kill. Brown paid Atkinson an additional $200 for this tag. After the hunt, Atkinson arranged for Campbell to illegally purchase another hunter's unused tag so he could ship his deer back to Florida.

[2]Brown testified that he actually paid Atkinson between $1,800 and $2,000 for arranging the trip. Campbell apparently traded Atkinson auto body work worth between $2,500 and $2,800 for his spot in the hunt.

The Montana Department of Fish, Wildlife and Parks eventually became aware of Atkinson's activities. As a result, the Department arranged for South Carolina State Conservation Officers Larry McClain and Tommy Norris to book a hunting trip with Atkinson's agency. Although both officers paid the standard $1,500 outfitting fee, neither was charged for, or received, a Montana state hunting license. Atkinson told Norris to buy a bird-hunting license, in case he was stopped by a game warden.[3]

During the hunt, each officer killed one deer. Norris placed Nelson's deer tag on his kill because he did not have a tag of his own. At Atkinson's direction, Norris later paid Nelson $200 for the tag. After the hunt, McClain paid Atkinson an additional $100 to ship his deer back to South Carolina.

Atkinson was eventually arrested by Montana state game wardens and charged with twenty-three violations of the Lacey Act. Bacon and Nelson both testified against Atkinson at trial, as did a number of Atkinson's former clients. Atkinson was convicted of twenty-one violations of the Act and sentenced to thirty-seven months in federal prison. This appeal followed.

VALUATION

The Lacey Act makes it unlawful to sell or transport in interstate commerce wildlife taken in violation of state law. 16 U.S.C. § 3372(a)(2)(A). Under this section, a person "sells" wildlife in violation of the Act whenever, for money or other consideration, he offers or provides "guiding, outfitting, or other services" or "a hunting or fishing license or

[3]When McClain originally booked his trip, he told Atkinson that he already possessed a fake Montana state hunting license. During the trip, he and Atkinson joked about the fact that McClain was hunting under a bogus license. At trial, Bacon testified that Atkinson had also arranged for Norris to use a license issued in the name of Mike Key.

permit" for the illegal taking of wildlife. 16 U.S.C. 3372(c)(1).[4] A violation of section 3372 is punishable by five years imprisonment, a fine of $20,000, or both, provided the market value of the animals sold exceeded $350. 16 U.S.C. § 3373(d)(1)(B).

[1] The market value of wildlife under the Lacey Act is a factual question reserved for the jury. *Stenberg*, 803 F.2d at 433. The trial judge instructed the jury that it could determine the market value of the deer sold by Atkinson either by the price each deer would bring if sold on the open market (less than $150 each in this case), or by the "price paid for guiding services for the hunt in which the wildlife was taken." Atkinson argues that the court erred in allowing the jury to consider the price of his guide services in determining the market value of the deer.

United States v. Todd, 735 F.2d 146 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985), is the only case directly addressing the method for determining the market value of an animal killed during a guided hunt. Todd was a commercial guide who specialized in arranging illegal airborne hunts. He charged between $1,000 and $5,000 for his services. Todd appealed his conviction under the Lacey Act, arguing that the trial court improperly considered the cost of his guide services in calculating the market value of the animals killed by his clients. The Fifth Circuit held that because an offer to provide guide services is an offer to sell wildlife under the Act, "[t]he best indication of the value of the game 'sold' in this manner

[4]In *United States v. Stenberg*, 803 F.2d 422 (9th Cir. 1986), we held that the sale of wildlife under the Lacey Act did not encompass the sale of guide services. The Act was amended in 1988 to include section 3372(c). Pub. L. 100-653, § 101(3), 102 Stat. 3825 (1988). The express purpose of this amendment was to overturn our holding in *Stenberg*. *See* S. Rep. No. 100-563, 100th Congress, 2d Sess. 9-10 ("This amendment would overturn the decision in *United States v. Stenberg* [citation omitted], which held that . . . the term 'sale of wildlife' does not include the provision of guiding services."), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5374.

is the price of the hunt." *Id.* at 152. *Todd* was decided before the Lacey Act was amended to include section 3372(c). Consistent with section 3372(c), we conclude that *Todd* sets forth the proper method for valuing game taken on a guided hunt.

[2] A violation of section 3372(c) does not involve a "sale" of game in the traditional sense; rather, under section 3372(c) the commodity being "sold" is the opportunity to illegally hunt game with the assistance of a guide. *See Stenberg,* 803 F.2d at 436 (an ordinary person would view the sale of guiding services "as providing the buyer the opportunity to kill wildlife, . . . [not] an actual sale of the wildlife itself"). As a result, the value of an animal taken in a guided hunt bears little relation to the market price of its parts. Instead, as the Fifth Circuit recognized in *Todd,* its market value is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt. *Todd,* 735 F.2d at 152.

Atkinson relies on *Stenberg* to support his contention that an animal's market value under the Act can only be determined by the aggregate value of its parts on the open market. In *Stenberg,* the trial court had allowed the jury to consider the cost of guide services in calculating the market value of game killed during a hunt. *Stenberg,* 803 F.2d at 432. Stenberg argued that this was an improper method for determining an animal's market value under the Lacey Act. We never resolved the valuation issue, because we concluded that an offer to provide guide services was not a "sale" under the Act. *Id.* at 437. Consequently, *Stenberg* offers little guidance on the proper method for determining the market value of an animal taken during a guided hunt.

[3] Atkinson also suggests an alternate method for determining market value in this case. Montana Code § 87-1-111 requires a person convicted of illegally killing a deer to "reimburse" the state $300. Atkinson argues that this figure should be conclusive of a deer's market value for purposes of the Act. We reject this argument. Atkinson has produced no

evidence that Montana intended section 87-1-111 to define the market value of deer taken in violation of state law. Nor do the fines established under this code section appear to bear any resemblance to the actual market values of the animals listed.

JURY INSTRUCTIONS

[4] Atkinson raises three more challenges to the district court's jury instructions. First, he argues that the trial court improperly read certain portions of his indictment to the jury. Second, he claims that the court's aiding and abetting instruction was inadequate. Finally, he contends that the court erred by refusing to give two of his proposed jury instructions. None of these arguments is persuasive.

A. Indictment

The decision to read an indictment to the jury is within the sound discretion of the trial court. *United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). Given the complexity of this case, the court did not abuse its discretion when it attempted to clarify the charges against Atkinson by reading them directly from the indictment.

B. Aiding and Abetting Instructions

Atkinson also argues the trial court's instructions failed to inform the jury that they could convict Atkinson of aiding and abetting only if they first found he assisted in the commission of a crime.

"When reviewing a claim of error relating to jury instructions, the instructions must be viewed as a whole." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984). Here, the court gave the jury a number of instructions outlining the elements necessary to convict Atkinson of aiding and

abetting. When read together, these instructions clearly informed the jury they could convict Atkinson only if they found he took some affirmative step to assist in the commission of a crime. This was sufficient.

C. Atkinson's Proposed Instructions

Atkinson proposed two additional jury instructions. First, he asked for an instruction clarifying the meaning of "taking game" under Montana law. Second, he sought an instruction on the requirements for tagging deer in Montana. He contends that the trial court erred in refusing to give either of these proposed instructions.

"A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence." *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir. 1985). Here, neither instruction was relevant to the issues presented at trial. Consequently, the trial court did not err in rejecting them.[5]

SUFFICIENCY OF THE EVIDENCE

Atkinson argues that the evidence presented was insufficient to support his convictions for conspiring to violate the Lacey Act. He also contends that the evidence failed to show he sold or transported wildlife in interstate commerce as required under the Act.

In deciding whether evidence is sufficient to support a conviction, we examine the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime

[5]Although the standard for reviewing the denial of a proposed jury instruction is unsettled in this circuit, *United States v. Sotelo-Murillo*, 887 F.2d 176, 179-80 (9th Cir. 1989), our conclusion in this case is the same under either a de novo or abuse of discretion standard.

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A. Conspiracy

"The elements of [a] conspiracy are (1) an agreement to accomplish an illegal objective, (2) coupled with one or more acts in furtherance of the illegal purpose, and (3) the requisite intent to commit the underlying substantive offense." *United States v. Pemberton*, 853 F.2d 730, 733 (9th Cir. 1988). The agreement giving rise to a conspiracy need not be explicit. *United States v. Thomas*, 887 F.2d 1341, 1347 (9th Cir. 1989).

There was ample evidence of a conspiracy among Atkinson, Bacon and Nelson. Bacon and Nelson expressly agreed with Atkinson to provide guide services for unlicensed hunters. Further, they agreed to sell their own deer tags to these hunters in violation of Montana law.

Atkinson also conspired with the hunters who accompanied him to Montana. Atkinson agreed to guide these hunters knowing they were not legally authorized to hunt game. On the few occasions he was questioned about the need for hunting licenses, he either arranged to provide the hunters with fake licenses or encouraged them to hunt without licenses. He also agreed to conduct illegal nighttime hunts. Finally, he plotted with at least three hunters to unlawfully mistag their kills.

[5] Given this evidence, a reasonable jury could have found that Atkinson conspired to violate the Lacey Act.

B. Interstate Transport

[6] Atkinson also argues the evidence failed to show he either sold or transported wildlife in interstate commerce as required under the Act. *See* 16 U.S.C. § 3372(a)(2)(A). We disagree.

-B-

At the end of each hunt, Atkinson either arranged to ship the deer carcasses to hunters' homes outside the State of Montana, or assisted the hunters in these shipments. This satisfies the Act's interstate commerce requirement. *See United States v. Gay-Lord*, 799 F.2d 124, 126 (4th Cir. 1986) (Lacey Act satisfied when defendant "knew that [wildlife] would be transported in interstate commerce and took the steps that began their travel to interstate markets").[6]

SENTENCING GUIDELINES

[7] Atkinson argues that the district court improperly increased his base offense level under the Federal Sentencing Guidelines for: (1) committing an offense under the Lacey Act involving wildlife with a market value in excess of $20,000 (section 2Q2.1); (2) acting as the organizer of a criminal activity involving five or more participants (section 3B1.1); and (3) obstructing justice (section 3C1.1).

A. Sentencing Guideline § 2Q2.1

Sentencing Guideline § 2Q2.1(b)(3)(A) provides for an increase in a defendant's base offense level for smuggling or unlawfully dealing in wildlife with a market value greater than $2,000. The amount of this increase is determined by reference to the table at section 2F1.1. When the market value of game exceeds $20,000, the table requires an increase of four levels. The district court found that the aggregate market value of the deer in this case was $21,000.

Atkinson argues that section 2Q2.1 is inapplicable because deer are not "specially protected" wildlife. He also contends that even if deer are specially protected, the market value of

[6]The indictment did not charge, nor does the government contend, that Atkinson violated the Lacey Act by arranging for the hunters to cross state lines to hunt deer. Accordingly, we do not consider whether this would satisfy the Act's interstate commerce requirement.

the deer taken did not justify the four-level increase imposed by the trial court.

Atkinson's argument that section 2Q2.1 does not apply to "ordinary" wildlife taken in violation of the Lacey Act is contrary to the history of the section. Prior to 1989, the Guidelines contained two sperate provisions dealing with the unlawful sale of wildlife. Section 2Q2.1 expressly applied only to "specially protected" animals, while section 2Q2.2 applied to all violations of the Lacey Act. On November 1, 1989, section 2Q2.2 was deleted and consolidated with section 2Q2.1. *See* United States Sentencing Commission Guidelines Manual, Appendix C, amendment 209 (1991). As part of this consolidation, the reference to specially protected wildlife was omitted from section 2Q2.1(b)(3)(A). Thus, there is no distinction under this section between specially protected animals and animals taken in violation of the Lacey Act.

Atkinson argues that even if this section applies, the market value of the deer in this case did not warrant a four-level increase in his sentence. The district court calculated the market value of the deer by multiplying Atkinson's standard outfitting fee ($1,500) by the number of deer killed (14). The result was a total market value of $21,000. As the district court correctly concluded, this corresponds to a four-level increase under section 2F1.1.

B. Sentencing Guideline § 3B1.1(a)

Atkinson's sentence was enhanced four levels because the trial court found he "organize[d] . . . a criminal activity that involved five or more participants. . . ." Federal Sentencing Guideline § 3B1.1(a). Atkinson argues that his sentence was improperly increased under this section because none of the hunters qualified as a "participant."

For purposes of section 3B1.1, "[a] 'participant' is a person who is criminally responsible for the commission of the

offense, but need not have been convicted." Federal Sentencing Guideline § 3B1.1 (Application Note 1); *see also United States v. Anderson*, 942 F.2d 606, 615 (9th Cir. 1991) ("participant" under section 3B1.1 means "criminally responsible person").

Each of the hunters was criminally responsible for illegally buying game in violation of the Lacey Act. *See* 16 U.S.C. § 3372(c)(2)(A) (buying guiding, outfitting or other services is a "purchase of wildlife" under the Act). Thus, even though none of the hunters was prosecuted, all twelve of them qualified as "participants" under Guideline section 3B1.1(a).

Finally, each of the four hunts involved Atkinson,[7] Wayne Bacon and Brian Nelson (the two guides/ranch owners), as well as at least two hunters. Thus, even if the four hunts are viewed as separate criminal activities, each involved five or more participants.

C. Sentencing Guideline § 3C1.1

The district court also increased Atkinson's sentence because it found he obstructed justice by instructing Campbell and Brown to lie to federal agents during the investigation. Under section 3C1.1, a two-level increase is warranted where a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation. . . ."

Campbell testified that Atkinson contacted him several weeks after the hunt and told him not to speak with the police about his trip to Montana. Atkinson also helped Campbell concoct a story to tell the authorities if he was forced to discuss the hunt. He instructed Brown in the same manner.

[7]The defendant may be considered in calculating the total number of participants for purposes of section 3B1.1. *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990).

The district court did not err in determining that Atkinson obstructed justice under section 3C1.1.

CONCLUSION

We affirm the appellant's conviction and sentence on all counts.

FILED
Nov. 16, 1990
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,	)	Cause Nos.
	)	CR 90-48-BLG-JDS-01
	)	CR 90-48-BLG-JDS-02
	)	CR 90-48-BLG-JDS-04
Plaintiff,	)	CR 90-48-BLG-JDS-06
	)	CR 90-48-BLG-JDS-07
v.	)	CR 90-48-BLG-JDS-09
MELVILLE O'NEAL ATKINSON, JR., d/b/a NEAL'S WILDERNESS OUTFITTERS, INC.; BOBBY BAGLEY; DANNY CONNELL; DAVID MICHAEL KEY; WADE DURHAM; and RUSSELL DUFFY,	)	CR 90-48-BLG-JDS-10
	)	ORDER
	)	* * * * *
Defendants.	)	

Pursuant to proceedings in held open court on November 13, 1991, and the undersigned's rulings from the bench,

IT IS ORDERED:

1. The identical motions to dismiss of defendants Bagley, Connell, Key, Duffy and Durham are denied. As stated by Counsel Woodward, a conviction for a misdemeanor is possible in the event that a lower than $350 value is established for each animal taken in violation of the Lacey Act, 16 U.S.C. §§ 3371 et. seq.; United States v. Stenburg, 803 F.2d 422, 432 (9th Cir. 1986).

2. The motions of defendants Atkinson and Harrell to determine the value of a deer, based upon the values set forth under Montana law in MCA §7-1-111, are denied. The value of the game taken for the purposes of conviction under the Lacey Act is "market value." 16 U.S.C. § 3373(a). Thus, the value of any game taken remains a question of fact for trial.

3. The motions of defendants Durham and Duffy to take the deposition of Chase Briener and Bob Schichenmaier to preserve their testimony for trial are granted pursuant to Rule 15. It shall be the responsibility of the defendants to notice and take these depositions.

4. The motions of defendants Durham and Duffy to sever Count XXIII are granted as to all defendants

named in that count. The Court finds it unduly prejudicial to try defendants Duffy and Durham in a lengthy trial of numerous counts when Durham and Duffy are charged in a single count involving a completely separate transaction.

5. The December 3, 1990 trial setting shall remain in effect as to both severed Count XXIII and the remaining counts, with juries for both trials to be selected on that date. Trial on the remaining counts will commence immediately following selection of both furies; and trial on severed Count XXIII will trail.

7. The government's motion to amend the Indictment to clarify several errors is granted and the changes reflected in the government's motion shall be entered of record as an amendment to the Indictment.

DONE and DATED this 16th day of November, 1990.

s/ Jack D. Shanstrom

FILED
Sep 10 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 91-30084
	)	D.C. No. CR-90-48-JDS
Plaintiff-Appellee,	)	
v.	)	ORDER
MELVILLE O'NEAL ATKINSON,	)	
Defendant-Appellant.	)	

Before: HUG, NOONAN and THOMPSON, Circuit Judges.

The petition for rehearing is denied.

FILED
Jul 17 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 91-30084
	)	D.C. No. CR-90-48-JDS
Plaintiff-Appellee,	)	
v.	)	ORDER
MELVILLE O'NEAL ATKINSON,	)	
Defendant-Appellant.	)	

Before: HUG, NOONAN and THOMPSON, Circuit Judges.

The petition for rehearing is denied.

JUDGMENT

FILED
Sep 21 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-30084
CT/AG#: CR 90-48-JDS

A TRUE COPY
Cathy A. Catterson
Clerk of Court
ATTEST
Sep 17 1992
by Deputy Clerk

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MELVILLE O'NEAL ATKINSON

Defendant - Appellant

APPEAL from the United States District Court for the District of Montana (Billings).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and

was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 04/27/92
Amended: 07/22/92

Filed and Entered
in Criminal Docket
Mar 1 1991
Lou Aleksich, Jr., Clerk
By Sandra L. Studiner

UNITED STATES OF AMERICA,	)	Judgment in a Criminal Case (For Offenses Committed On or After November 1, 1987)
Plaintiff,	)	
v.	)	No. CR 90-48-BLG-JDS-01
MELVILLE O'NEAL ATKINSON, JR., dba NEAL'S WILDERNESS OUTFITTERS, INC.	)	Steve Moses, Defendant's Attorney
Defendant	)	

THE DEFENDANT:

pleaded guilty to count(s) _____

x was found guilty on count(s) I through XX and Count XXII after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 16 USC 3372(a)(2)(A)
16 USC 3373(d)(1)(B)

Nature of Offense: Interstate transport of illegally

taken wildlife

Date Offense Concluded: Fall 1989

Count Number(s): I

Title & Section: 16 USC 3372(a)(2)(A)
16 USC 3373(d)(1)(B)
18 USC 2

Nature of Offense: Interstate transport of illegally taken wildlife or aiding and abetting

Date Offense Concluded: Fall 1989

Count Number(s): II, III, V, VII, IX, X, XII, XIV, XVI, XVIII, XX, XXII

Title & Section: 18 USC 371

Nature of Offense: Conspiracy to transport illegally taken wildlife across state lines

Date Offense Concluded: Fall 1989

Count Number(s): IV, VI, VIII, XI, XIII, XV, XVII, XIX

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

x Count(s) XXI and XXIII are dismissed on the motion of the United States

x It is ordered that the defendant shall pay a special assessment of $1,050.00, for count(s) I-XX and Count XXII, which shall be due /x/ immediately / / as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc.Sec.No.: 263-64-5572

Defendant's Date of Birth: 12-16-41

Defendant's Mailing Address:

415 Crestwood Street

Jacksonville, Florida 32208

Defendant's Residence Address:

Same

Date of Imposition of Sentence: February 8, 1991

s/ Jack D. Shanstrom
Jack D. Shanstrom
U.S. District Court
Name & Title of Judicial Officer

February 27, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty-seven (37) months.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States marshal.

The defendant shall surrender to the United States marshal for this district

at _____ am/pm on _____

as notified by the United States marshal.

x The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

before 2 p.m. on _____

x as notified by the United States marshal

as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____ Defendant delivered on _____

to _____, with a certified copy of this judgment

United States Marshal

By: Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

x The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

x The defendant shall not possess a firearm or

destructive device. Defendant shall provide financial disclosure of his personal income, assets, and liabilities to the supervising probation officer upon request. Defendant shall provide disclosure regarding his employment activities to the supervising probation officer upon request. Defendant is prohibited from hunting, fishing, guiding, trapping or accompanying anyone so-acting any where in the world.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

x The defendant shall make restitution to the foregoing persons in the following amounts:

Name of Payee	Amount of Restitution
State of Montana	$21,000.00

Payments of restitution are to be made to:

x the United States Attorney for transfer to the payee(s).

the payee(s).

Restitution shall be paid:

in full immediately.

in full not later than _____

in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

x in installments according to the following schedule of payments: As the United States Probation Office shall direct.

Any payment shall be divided proportionately among

the payees named unless otherwise specified here.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

x The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: II

Imprisonment Range: 30 to 39 months

Supervised Release Range: 2 to 3 years.

Fine Range: $6,000 to $60,000

x Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $21,000.00

Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called

for by application of the guidelines.

OR

x The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): a sentence at the top of the guideline range provides punishment and general deterrence relevant to the Sentencing Commission's objectives.

OR

The sentence departs from the guideline range

upon motion of the government, as a result of defendant's substantial assistance

for the following reason(s):

KRIS A. McLEAN
Assistant U.S. Attorney
301 South Park, Room 564
Federal Building, Drawer 10031
Helena, MT 59626

Telephone: (406) 449-5370
ATTORNEY FOR THE UNITED STATES

FILED
Sep 4 1990
Lou Aleksich, Jr.,
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MELVILLE O'NEAL ATKINSON, JR., d/b/a/ NEAL'S WILDERNESS OUTFITTERS, INC.; BOBBY BAGLEY; JOHN CAMPBELL; DANNY CONNELL; SERGIO GARCIA; DARREN JOSEPH HARRELL; DAVID MICHAEL KEY; ROBERT LIGHTSEY;	CR 90-48-BLG-JDS-01 Title 16 U.S.C. §3372(a)(2)(A) (Penalty: 5 years and/or $250,000) Title 16 U.S.C. §3373(d)(1)(B) (Penalty: 5 years and/or $250,000)

WADE DURHAM;)
RUSSELL DUFFY,)
)
Defendants.)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That from on or about November 16, 1989, and continuing until on or about November 22, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., and unindicted co-conspirators Brian Nelson, Wayne James Bacon, and Charlie Brown, did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: One 3x3 mule deer buck and one 4x3 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, in violation of Title 16 U.S.C. § 3372(a)(2)(A) and Title 16 U.S.C. § 3373(d)(1)(B).

In furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Brian Nelson, Wayne James Bacon, and/or Charlie Brown, committed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Charlie Brown and directed Charlie Brown to kill a deer illegally;

(2) Charlie Brown shot and killed a 3x3 mule deer buck and a 4x3 mule deer buck without first having obtained a license from the State of Montana to legally take big game;

(3) Wayne James Bacon placed his Montana resident deer license and/or tag upon the 4x3 mule deer buck illegally killed by Charlie Brown;

(4) Brian Nelson guided Charlie Brown on hunts knowing Charlie Brown had no license to legally take big game in the State of Montana;

all in violation of 18 U.S.C. §371.

COUNT II

That on or about the 22nd day of November, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., did knowingly engage in conduct that involved the sale and purchase of wildlife with a

market value in excess of $350.00, to-wit: One 3x3 mule deer buck, by knowingly aiding and abetting Charlie Brown in transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically, §87-2-103, MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT III

That on or about the 22nd day of November, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: One 4x3 mule deer buck, by knowingly aiding and abetting Charlie Brown in transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically, §87-2-103, MCA, all in violation of 16 U.S.C. §3373(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C.

§2.

COUNT IV

That from on or about November 6, 1989, and continuing until on or about the 12nd day of November, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and unindicted co-conspirators, Wayne James Bacon and Gilbert Gregory did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 3x4 mule deer buck and one 2x2 mule deer buck by knowingly attempting to transport said wildlife in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically, §87-2-103, MCA, in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B). In furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Gilbert Gregory and/or Wayne James Bacon, committed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding

services to Gilbert Gregory;

(2) Melville O'Neal Atkinson, Jr., told Gilbert Gregory that Gilbert Gregory could kill two deer using a special "outfitter" license;

(3) Wayne James Bacon guided Gilbert Gregory on deer hunts knowing that Gilbert Gregory had no license to take deer within the State of Montana;

(4) Gilbert Gregory killed a 3x4 mule deer buck and a 2x2 mule deer buck without first obtaining a license from the State of Montana to hunt deer;

(5) Melville O'Neal Atkinson, Jr., accepted payment from Gilbert Gregory for shipment of the aforementioned wildlife or wildlife parts from the State of Montana to the State of Florida;

(6) Melville O'Neal Atkinson, Jr., placed the Montana non-resident license of Ray Walden on one of the 3x4 mule deer bucks illegally killed by Gilbert Gregory;

all in violation of 18 U.S.C. §371.

COUNT V

That sometime after, on or about November 6, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., did knowingly engage in conduct that involved the sale and purchase of wildlife with a market

value in excess of $350.00, to-wit: one 3x4 mule deer buck by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT VI

That from on or about November 6, 1989, and continuing until on or about November 12, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and Robert Lightsey did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x6 mule deer buck and one 3x3 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, in violation of 16 U.S.C.

§3372(a)(2)(A) and 3373(d)(1)(B), in furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., and/or Robert Lightsey, performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., provided guiding services to Robert Lightsey knowing that he had no license to legally take big game in the State of Montana;

(2) Robert Lightsey killed a 5x6 mule deer buck without first having obtained a license from the State of Montana to legally hunt deer;

(3) Robert Lightsey killed a 3x3 mule deer buck without first having obtained a license from the State of Montana to take big game;

(4) Melville O'Neal Atkinson, Jr., placed the Montana non-resident hunting license and/or tag on the 5x6 mule deer buck illegally killed by Robert Lightsey; all in violation of 18 U.S.C. §371.

COUNT VII

That sometime after, on or about November 16, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and Robert Lightsey did knowingly engage in conduct that involved the sale and purchase

of wildlife with a market value in excess of $350.00, to-wit: one 5x6 mule deer buck, by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT VIII

That from on or about November 11, 1989, and continuing until on or about November 23, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and Robert Bagley, did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 mule deer buck and one 5x5 mule deer buck, by knowingly transporting said wildlife in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA §87-2-509 and MCA §87-3-103, in

violation of 16 U.S.C. § 3372(a)(2)(A) and 3373(d)(1)(B), in furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., David Michael Key and/or Robert Bagley, performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Robert Bagley knowing that Robert Bagley had no license to legally take big game in the State of Montana;

(2) Brian Nelson guided Robert Bagley on deer hunts in the State of Montana;

(3) Robert Lightsey killed a 4x4 mule deer buck and failed to tag said deer as required by law;

(4) Robert Bagley shot and killed a 5x5 mule deer buck which constituted an over-limit of deer;

(5) Robert Bagley paid Melville O'Neal Atkinson, Jr., $700.00 cash for Atkinson's guiding services which allowed Bagley to illegally shoot and kill the 5x5 mule deer buck described above;

all in violation of 18 U.S.C. §371.

COUNT IX

That sometime after November 11, 1989, within the State and District of Montana, Melville O'Neal

Atkinson, Jr., David Michael Key and Robert Bagley did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA § 87-3-103, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT X

That some time after November 11, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., David Michael Key and Robert Bagley did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 mule deer buck, by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of

the State of Montana, specifically MCA § 87-2-509, all in violation of Title 16 U.S.C. §3373(a)(2)(A) and Title 16 U.S.C. §3373(d)(1)(B), and Title 18 U.S.C. §2.

COUNT XI

That from on or about November 11, 1989 and continuing on or about November 23, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., Danny Connell, and unindicted co-conspirator, Wayne James Bacon, did knowingly conspire, confederate, and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly transporting said wildlife in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA §87-2-509, in violation of 16 U.S.C. § 3372(a)(2)A) and 3373(d)(1)(B), in furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Danny Connell and/or Wayne James Bacon, performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Danny Connell;

(2) Wayne James Bacon guided Danny Connell on deer hunts;

(3) Danny Connell shot and killed a 5x5 mule deer buck and failed to tag said deer as required by law;

(4) Danny Connell transported the antlers of the previously described 5x5 mule deer buck on a commercial airliner from the State of Montana to the State of Florida;

all in violation of 18 U.S.C. §371.

COUNT XII

That on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., and Danny Connell did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit one 5x5 mule deer buck, by knowingly transporting said wildlife in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA § 87-2-509, all in violation

of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XIII

That from on or about November 11, 1989, and continuing until on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., and unindicted co-conspirator, Steve Davis, did knowingly conspire, confederate, and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA § 87-2-509, in violation of 16 U.S.C. § 3372(a)(2)(A) and 3373(d)(1)(B), in furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., and/or Steve Davis performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Steve Davis to hunt deer in the State of

Montana;

(2) Steve Davis shot and killed a 4x4 mule deer buck and failed to tag said deer as required by law;

(3) Steve Davis transported said illegally taken and/or possessed mule deer buck of the previously described 5x5 mule deer buck on a commercial airliner from the State of Montana to the State of Georgia; all in violation of 18 U.S.C. §371.

COUNT XIV

That on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 mule deer buck, by knowingly aiding and abetting Steve Davis in the transportation of said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically MCA §87-2-509, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B) and 18 U.S.C. §2.

COUNT XV

That from on or about November 12, 1989, and continuing until on or about November 17, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., Sergio Garcia, and unindicted co-conspirator Steve Davis did knowingly conspire, confederate, and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 white tail buck deer, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, in violation of 16 U.S.C. §3372 (a)(2)(A) and 3373(d)(1)(B). In furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Steve Davis and/or Sergio Garcia performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Sergio Garcia to hunt deer in the State of Montana knowing that Sergio Garcia had no license to legally take big game in the State of Montana;

(2) Sergio Garcia shot and killed a 4x4 white tail buck deer without first having obtained a license to legally take big game in the State of Montana;

(3) Steve Davis transported the cape of the 4x4 white tail deer buck Sergio Garcia he had illegally killed, by commercial airliner from the State of Montana to the State of Georgia;

all in violation of 18 U.S.C. §371.

COUNT XVI

That on or about the 17th day of November, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and Sergio Garcia did knowingly engage in conduct that involved the sale and purchase of wildlife with a value in excess of $350.00, to-wit: one 4x4 white tail deer buck, by knowingly causing said wildlife or wildlife parts to be transported in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, all in violation of 16 U.S.C. § 3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XVII

That from on or about November 11, 1989, and

continuing until on or about November 23, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and unindicted co-conspirators, Wayne James Bacon, Brian Nelson, and Mark Pickren did knowingly conspire, confederate, and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-3-101(3), MCA, in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), in furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Wayne James Bacon, Brian Nelson and/or Mark Pickren performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Mark Pickren to hunt deer in the State of Montana;

(2) Melville O'Neal Atkinson directed Mark Pickren to shoot the aforementioned 5x5 mule deer buck at

night with the aid of a light;

(3) Mark Pickren shot and killed the aforementioned 5x5 mule deer buck at night with the aid of a light;

(4) Mark Pickren transported the antlers of the aforementioned 5x5 mule deer buck on a commercial airliner from the State of Montana to the State of Georgia;

all in violation of 18 U.S.C. §371.

COUNT XVIII

That on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly aiding and abetting Mark Pickren in the transportation of said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Georgia, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-3-101(3), MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XIX

That from on or about November 16, 1989 and

continuing until on or about November 22, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and John Campbell did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, in violation of 16 U.S.C. § 3372(a)(2)(A) and 3373(d)(1)(B), in furtherance of the conspiracy, Melville O'Neal Atkinson, Jr. and/or John Campbell performed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for John Campbell knowing that John Campbell had no license to legally take big gamer [sic] in the State of Montana;

(2) John Campbell shot and killed a 5x5 mule deer buck without first having obtained a license to legally take big game in the State of Montana;

(3) John Campbell transported the antlers of said 5x5 mule deer buck on a commercial airliner from the State of Montana to the State of Florida;

all in violation of 18 U.S.C. §371.

COUNT XX

That on or about the 22nd day of November, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr., and John Campbell did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 5x5 mule deer buck, by knowingly transporting said wildlife in interstate commerce from the State of Montana to the State of Florida knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XXI

That on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., and Darren Joseph Harrell did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one

5x5 mule deer buck, by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of South Carolina, knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-110, MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XXII

That on or about November 23, 1989, in the State and District of Montana, Melville O'Neal Atkinson, Jr., and Darren Joseph Harrell did knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350.00, to-wit: one 4x4 mule deer buck, by knowingly attempting to transport said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of South Carolina knowing that said wildlife was taken and/or possessed in violation of and in a manner unlawful under the laws and regulations of the State of Montana, specifically §87-2-103, MCA, all in violation of 16 U.S.C. §3372(a)(2)(A) and 3373(d)(1)(B), and 18 U.S.C. §2.

COUNT XXIII

That from on or about November 11, 1989, and continuing until on or about November 12, 1989, within the State and District of Montana, Melville O'Neal Atkinson, Jr, Russell Duffy, Wade Durham, and unindicted co-conspirator Dr. Frank Fain, did knowingly conspire, confederate and agree to knowingly engage in conduct that involved the sale and purchase of wildlife with a market value in excess of $350, to-wit: One 3x3 mule deer buck, by knowingly transporting said wildlife or wildlife parts in interstate commerce from the State of Montana to the State of Florida, knowing that said wildlife was taken in violation of and in a manner unlawful under the laws and regulations of the State of Montana, and specifically MCA § 87-2-103, in violation of Title 16 U.S.C. §3372(a)(2)(A) and Title 16 U.S.C. § 3373(d)(1)(B).

In furtherance of the aforementioned conspiracy, Melville O'Neal Atkinson, Jr., Russell Duffy, Wade Durham and/or Dr. Frank Fain committed one or more of the following overt acts:

OVERT ACTS

(1) Melville O'Neal Atkinson, Jr., organized guiding services for Dr. Frank Fain knowing that he had no

license to legally hunt big game in the State of Montana;

(2) Russell Duffy guided Dr. Frank Fain on deer hunts knowing that Dr. Fain had no license to legally hunt big game in the State of Montana;

(3) Wade Durham guided Dr. Fain on hunts knowing that Dr. Fain had no license to legally hunt big game in the State of Montana;

(4) Dr. Frank Fain shot and killed a 3x3 mule deer buck without first obtaining a license from the State of Montana to hunt big game;

(5) Russell Duffy illegally tagged the 3x3 mule deer buck shot and killed by Dr. Fain;

(6) Wade Durham collected a portion of the outfitting fee from Dr. Fain;

all in violation of Title 18 U.S.C. §371.

A TRUE BILL.

s/ Wayne L. Jacobson
Foreperson

s/ Carl E. Rostad
United States Attorney
For the District of Montana

CONSTITUTIONAL PROVISIONS

1. United States Constitution, Article I, Section 9(3) -- No Bill of Attainder or ex post facto Law shall be passed.

2. United States Constitution, Fifth Amendment -- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution, Sixth Amendment -- In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obstaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

Lacey Act

"16 U.S.C. Section 3372.
Prohibited acts

(a) **Offenses other than marking offenses**

It is unlawful for any person --

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce --

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18) --

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(4) having imported, exported, transported, sold, purchased, or received any fish or wildlife or plant imported from any foreign country or transported in interstate or foreign commerce, to make or submit any false record, account, label, or identification thereof; or

(5) to attempt to commit any act described in paragraph (1) through (4)."

1988 Amendment to 16 U.S.C. Section 3372 as set forth in Pub.L. 100-653, Title I, Section 101, Nov. 14, 1988, 102 Stat. 3825

"16 U.S.C. Section 3372(a). **Prohibited acts**

(a) **Offenses other than marking offenses**

It is unlawful for any person --

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(4) to attempt to commit any act described in paragraphs (1) through (4).

. . .

(c) **Sale and purchase of guiding and outfitting services and invalid licenses and permits**

(1) **Sale**

It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) **Purchase**

It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife."

"16 U.S.C. Section 3373.
Penalties and sanctions

(a) **Civil penalties**

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsection 3372(b) of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation: *Provided*, That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for

violation of said law, treaty, or regulation, or $10,000, whichever is less.

(2) Any person who violates section 3372(b) of this title may be assessed a civil penalty by the Secretary of not more than $250.

(3) For purposes of paragraphs (1) and (2), any reference to a provision of this chapter or to a section of this chapter shall be treated as including any regulation issued to carry out any such provision or section.

(4) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of the said fish or wildlife or plants.

(5) Any civil penalty assessed under this subsection may be

remitted or mitigated by the Secretary.

(6) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the Secretary shall take into account the nature, circumstances, extent, and the gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, ability to pay, and such other matters as justice may require.

. . .

(d) **Criminal penalties**

(1) Any person who --

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than section 3372(b) of this title), or

(B) violates any provision of this chapter (other than section 3372(b) of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or

wildlife or plants with a market value in excess of $350,

knowing that fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than section 3372(b) of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation

shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

1988 Amendment to 16 U.S.C. Section 3373 as set forth in Pub.L. 100-653, Title I, Section 102, 103, Nov. 14, 1988, 102 Stat. 3825, 3826.

(a) **Civil penalties**

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, and any person who knowingly violates section 3372(d) of this title may be assessed a civil penalty by the Secretary of not more than $10,000 for each

such violation: *Provided*, That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or $10,000, whichever is less.

. . .

(d) **Criminal penalties**

(1) Any person who --

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this

title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,

knowing that fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in

violation of, or in a manner unlawful under any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(3) Any person who knowingly violates section 3372(d) of this title --

(A) shall be fined under Title 18, or imprisoned for not more than 5 years, or both, if the offense involves --

(i) the importation or exportation of fish or wildlife or plants; or

(ii) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants

with a market value greater than $350; and

(B) shall be fined under Title 18, or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A) of this subsection."

FEDERAL SENTENCING GUIDELINES PROVISIONS

Section 2Q2.1

"Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved a commercial purpose, increase by 2 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the specially protected fish, wildlife or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in

§2F1.1 (Fraud and Deceit); or

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

Section 2Q2.1 as amended, effective November 1, 1991 --

"Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved a commercial purpose, increase by 2 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as

required by law, increase by 2 levels.

(3) (If more than one applies, use the greater);

(A) If the market value of the fish, wildlife or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels."

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-1170

In the Supreme Court of the United States

OCTOBER TERM, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWARD J. SHAWAKER
EVELYN S. YING
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, under the criminal penalty provision of the Lacey Act, 16 U.S.C. 3373(d)(1)(B), the price paid for guiding or outfitting services for unlawful hunting expeditions may be considered in determining whether a violation of the Act involved goods having a market value in excess of $350.

2. Whether the district court's jury instruction that defined "market value" for the purpose of applying the penalty provision of the Lacey Act was vague and ambiguous.

3. Whether petitioner's sentence was properly enhanced under Sentencing Guidelines § 2Q2.1(b)(3)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981)	7
Huddleston v. *United States*, 415 U.S. 814 (1974)	7
Miller v. *Florida*, 482 U.S. 423 (1987)	9
Russello v. *United States*, 464 U.S. 16 (1983)	7
United States v. *Combs*, 762 F.2d 1343 (9th Cir. 1985)	8
United States v. *Stenberg*, 803 F.2d 422 (9th Cir. 1986)	2, 6
United States v. *Todd*, 735 F.2d 146 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985)	7
United States v. *Wentz*, 800 F.2d 1325 (4th Cir. 1986)	8

Constitution, statutes and regulations:

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause)	9
Lacey Act, 16 U.S.C. 667e *et seq.*	2
Lacey Act Amendments of 1988, Pub. L. No. 100-653, § 101(3), 102 Stat. 3825	2
16 U.S.C. 3372(a)(2)(A)	2
16 U.S.C. 3372(c)	6
16 U.S.C. 3372(c)(1)	2
16 U.S.C. 3372(c)(1)(A)	5, 8
16 U.S.C. 3373	5, 7
16 U.S.C. 3373(d)(1)(B)	2, 3, 4, 5, 6
18 U.S.C. 371	2
Sentencing Guidelines:	
§ 2Q2.1	5, 9, 10
§ 2Q2.1(b)(3)(A)	4, 9, 10
§ 2Q2.2	5, 10

Regulations—Continued Page

App. C, Amend. 209, Commentary (Nov. 1, 1990) 5, 10
App. C, Amend. 407 (Nov. 1, 1991) 10

Miscellaneous:

S. Rep. No. 123, 97th Cong., 1st Sess. (1981) 2
S. Rep. No. 563, 100th Cong., 2d Sess. (1988) 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1170

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A19) is reported at 966 F.2d 1270. The judgment of the district court (Pet. App. G1-G13) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F1-F2) was entered on July 22, 1992. A petition for rehearing was denied on September 10, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on December 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted on 21 counts of violating the Lacey Act and conspiring to do so based on his role in organizing and guiding several illegal deer hunting expeditions. See 16 U.S.C. 3372(a)(2)(A), 3372(c)(1), 3373(d)(1)(B); 18 U.S.C. 371. He was sentenced to 37 months in prison, to be followed by three years' supervised release, and he was ordered to pay $21,000 in restitution. Pet. App. G4-G10. The court of appeals affirmed.

1. The Lacey Act makes it unlawful to sell or transport in interstate commerce wildlife taken in violation of state law. 16 U.S.C. 3372(a)(2)(A). A person "sell[s]" wildlife in violation of the Act whenever, for money or other consideration, he offers or provides "guiding, outfitting, or other services" or a "hunting or fishing license or permit" for the illegal taking of wildlife. 16 U.S.C. 3372(c)(1).[1] A violation of the unlawful sale of wildlife provision under the Act is punishable by not more than five years' imprisonment, a fine of not more than $20,000, or both, provided it involves the "sale or

---

[1] In 1988, Congress amended the Lacey Act to overturn the decision in *United States* v. *Stenberg*, 803 F.2d 422, 437 (9th Cir. 1986), which held that the Act's prohibition against the "sale of wildlife" did not apply to the sale of guiding services or hunting permits. Lacey Act Amendments of 1988, Pub. L. No. 100-653, § 101(3), 102 Stat. 3825; see S. Rep. No. 563, 100th Cong., 2d Sess. 5 (1988) (amendment "defines the term 'sale' as it is used in the Lacey Act to include, as set forth in the Committee's report on the 1981 Act, the providing of guiding services used in the illegal taking of wildlife"); see also S. Rep. No. 123, 97th Cong., 1st Sess. 12 (1981) ("a commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is, in effect, an offer to sell wildlife").

purchase" of wildlife with a market value exceeding $350. 16 U.S.C. 3373(d)(1)(B).

Petitioner owned and operated a Jacksonville, Florida, business that organized and outfitted deer hunting expeditions in the State of Montana. Pet. App. A6. Petitioner charged a base outfitting fee of at least $1,500 per hunter.[2] In return, he provided meals, lodging, and guide services, and he promised to supply each hunter with a valid Montana state hunting license. Petitioner agreed to split his outfitting fees with two others who provided meals and lodging for the hunters at their Montana ranch and assisted petitioner in guiding the hunts. *Ibid.*

During November 1989, petitioner arranged for three separate hunting expeditions. Knowing that it was a violation of Montana law to hunt deer without a valid license, petitioner nonetheless proceeded to provide guide services for unlicensed hunters. Pet. App. A6-A8. He also agreed to guide some of the hunters on illegal nighttime hunts. In addition, petitioner instructed the hunters to tag their killed deer in violation of Montana law. At the end of each hunt, petitioner either arranged to ship the deer to the hunters' homes outside of Montana or assisted the hunters in arranging for the shipments. *Ibid.*

The Montana Department of Fish, Wildlife, and Parks became aware of petitioner's activities and arranged for two undercover officers to book a guided deer hunt with petitioner's agency. Pet. App. A8. Although each officer paid the standard $1,500 outfitting fee, neither received a valid Montana state hunting license. During the hunt, two deer were killed, and one officer paid petitioner an

---

[2] Petitioner also charged $200 for a Montana state hunting license and an additional fee if the hunter killed a second deer. Petitioner's fees generally ranged from $1,500 to $3,000 per hunter. Pet. App. A6-A8.

additional fee of $100 to ship his deer to South Carolina. *Ibid.* Petitioner was subsequently arrested by Montana state game wardens.

2. At sentencing, the probation officer recommended a sentence of 30 to 37 months' imprisonment under the Sentencing Guidelines for the 21 counts of conviction. The recommendation was based in part on a four-level increase for the market value of the illegally taken wildlife under Sentencing Guidelines § 2Q2.1(b)(3)(A). Petitioner challenged the probation officer's calculation of the offense level on several grounds, but the district court rejected petitioner's objections to the presentence report and sentenced him to 37 months' imprisonment. Pet. App. G4-G9.

3. On appeal, petitioner challenged his felony conviction by arguing, *inter alia*, that the government had failed to present sufficient evidence that the wildlife alleged in each count had a market value in excess of $350 under 16 U.S.C. 3373(d)(1)(B), and that the district court had erred in allowing the jury to consider the price of his guide services in determining the market value of the deer.[3] Petitioner also challenged his sentence, arguing for the first time on appeal that Sentencing Guidelines § 2Q2.1(b)(3)(A) could not be used to enhance a sentence for Lacey Act violations, because deer are not "specially protected" wildlife within the meaning of that Guideline.

The court of appeals affirmed petitioner's convictions and sentence. Pet. App. A1-A19. Specifically, the court held that, because an offer to provide guide services is an offer to sell wildlife under the Act, the district court did not err in allowing the jury to consider the amount a

[3] The district court had instructed the jury that it could determine the market value of the deer sold by petitioner either by the price each deer would bring if sold on the open market or by the "price paid for guiding services for the hunt in which the wildlife was taken." Pet. App. A9.

hunter paid for petitioner's guide services in determining the market value of the wildlife under the penalty provision. *Id.* at A9-A11. The court also concluded that a four-level increase was warranted under the version of Sentencing Guidelines § 2Q2.1 that was in effect when petitioner committed his crimes and when he was sentenced. After reviewing the history of the Guideline,[4] the court concluded that it applied to wildlife taken in violation of the Lacey Act. Pet. App. A16-A19.

ARGUMENT

1. Petitioner's principal contention (Pet. 9-32) is that the district court erroneously allowed the jury to consider the money paid for petitioner's guiding or outfitting services in determining "market value" under the criminal penalty provision of the Lacey Act, 16 U.S.C. 3373(d)(1)(B). Petitioner does not dispute (Pet. 14-17) that the sale of guiding and outfitting services is deemed a sale of wildlife under the Lacey Act. See 16 U.S.C. 3372(c)(1)(A). He argues, however, that because Congress enacted no "corresponding amendments to the penalty provisions" in 16 U.S.C. 3373, it must not have intended the price of such services to be used in calculating "market value" under the criminal penalty provision of the Lacey Act.

The criminal penalty provision of the Lacey Act states, in relevant part, that:

---

[4] The court of appeals noted that, prior to November 1, 1989, the Sentencing Guidelines contained two separate provisions dealing with unlawful offenses involving wildlife. Pet. App. A17. Section 2Q2.1 applied to violations of statutes such as the Endangered Species Act, which provide special protection to particular species of wildlife. Section 2Q2.2 applied to violations of the Lacey Act. Effective November 1, 1989, Section 2Q2.2 was deleted and consolidated with Section 2Q2.1. See Sentencing Guidelines App. C, Amend. 209 (Nov. 1, 1990); Pet. App. A17.

> Any person who * * * violates any provision of this chapter * * * by knowingly engaging in conduct that involves the sale or purchase of * * * wildlife * * * with a market value in excess of $350, * * * shall be fined not more than $20,000, or imprisoned for not more than five years, or both.

16 U.S.C. 3373(d)(1)(B). Congress has made clear that the sale of guiding and outfitting services for the illegal taking of wildlife is equivalent to the "sale or purchase of * * * wildlife" forbidden under the Act. See 16 U.S.C. 3372(c) and note 1, *supra*. See also Pet. App. A10, citing *Stenberg*, 803 F.2d at 436.[5] The penalty provision refers to the "sale or purchase of * * * wildlife * * * with a market value" above a fixed amount. When hunting or outfitting services are sold, it is a transaction (the sale or purchase) involving wildlife that is the basis of the offense. In that context, the phrase "market value" is properly construed as referring to "the sale or purchase" of wildlife—*i.e.*, the transaction that is the basis of the violation of the Act—rather than to the value of the wildlife itself. To be sure, in cases in which the violation of the Act is based on a direct sale of wildlife (rather than on the provision of services), the market value of the "sale or purchase" will be the same as the market value of the wildlife sold. When the "sale or purchase" at issue involves the provision of illegal wildlife services, however, the market value of such "sale

[5] The court of appeals also correctly noted that its decision in *Stenberg* provides no support for petitioner's argument (Pet. 13-14) that the market value of wildlife under the Act can be determined only by the aggregate value of the wild animal's parts on the open market. Pet. App. A10-A11. Since the court's conclusion in *Stenberg*—that an offer to provide guide services was not a "sale" under the Act—is no longer the law, that case "offers little guidance on the proper method for determining the market value of an animal taken during a guided hunt." Pet. App. A10-A11..

or purchase" involves the "amount a hunter is willing to pay for the opportunity to participate in the hunt." Pet. App. A10. See *United States* v. *Todd*, 735 F.2d 146, 152 (5th Cir. 1984) ("The best indication of the value of the game 'sold' in this manner is the price of the hunt."), cert. denied, 469 U.S. 1189 (1985). The fact that Congress failed to amend 16 U.S.C. 3373 to make explicit that the "market value" of wildlife could be determined by the price paid for guiding services is of no significance, since such an amendment would have been superfluous.[6]

2. Petitioner also argues (Pet. 17-32) that the jury instruction regarding the methods for determining the market value of wildlife was vague and ambiguous.

The district court instructed the jury as follows:

> The market value of wildlife may be established by several methods. One method is, of course, the price a piece of property would bring if sold on the open market between a willing buyer and seller. Another method to establish market value is the price paid for guiding services for the hunt in which the wildlife was taken. Either of the above methods is a proper method to use in determining market value.

Jury Instruction No. 50. Petitioner objects that the instruction was inadequate because, with respect to the valuation of the guiding services, it failed to specify whether "guiding services" referred to the total fee paid

---

[6] Petitioner's suggestion (Pet. 17) that the rule of lenity supports his argument is without merit. The rule of lenity is a rule of statutory construction employed only to resolve a "grievous ambiguity or uncertainty" in a statute. *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974); see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 29 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 342-343 (1981). There is nothing ambiguous about the criminal penalty provision of the Lacey Act.

by the hunters, including meals, lodging, and ground transportation.

By directing the jury's attention to the price asked and paid for "guiding services for the hunt in which the wildlife was taken," the instruction used the language of the statute. In fact, the statute included within the definition of wildlife not only "guiding * * * services," but "outfitting, or other services" as well. 16 U.S.C. 3372(c)(1)(A). Thus, the statute was more inclusive than the instruction and would have authorized the inclusion of the fee for lodging, meals, and transportation as "other services" related to the hunting expedition. By limiting the chargeable services to "guiding * * * services," the instruction gave petitioner the opportunity to argue to the jury that neither the value of the deer nor the value of the guiding services themselves exceeded $350 for each count charged in the indictment. Nonetheless, the jury heard testimony concerning the amount that was paid for the services, and in light of the high price petitioner charged each hunter for the hunting expedition, it was reasonable for the jury to conclude that the guiding services, no matter how narrowly defined, had a market value in excess of $350.[7]

---

[7] Petitioner's reliance on *United States* v. *Combs*, 762 F.2d 1343 (9th Cir. 1985), see Pet. 22-25, is unavailing. That case stands for the unremarkable proposition that a district court must instruct the jury on all the essential elements of the offense. The court did that in this case. Although petitioner would have preferred a more comprehensive instruction, the one given by the court was sufficiently clear to enable counsel to argue petitioner's points to the jury intelligently and to give the jury the proper legal framework for its factual findings. The decision in *United States* v. *Wentz*, 800 F.2d 1325 (4th Cir. 1986), is also unhelpful to petitioner. In that case, the defendant was convicted under a statute that made it unlawful to transport stolen property having a "value" of at least $5,000. See 800 F.2d at 1326, 1327. The jury was instructed that "value" meant either market value, which was

3. Petitioner contends (Pet. 32-49) that Sentencing Guidelines § 2Q2.1(b)(3)(A) cannot be applied to enhance his sentence, and that the court of appeals' reliance on a post-offense amendment to that Guideline violates the Ex Post Facto Clause. Contrary to petitioner's contention, there is no *ex post facto* problem in this case. As an initial matter, the sentencing court did not apply a version of the Guidelines that post-dated his offenses. The district court applied the 1989 version of Section 2Q2.1, which was in effect when petitioner committed his crimes and was still in effect when he was sentenced. Pet. App. A17-A18 & n.7. Thus, petitioner's case does not involve the retroactive application of a Guideline, and presents no constitutional issue. See *Miller* v. *Florida*, 482 U.S. 423, 430 (1987).

Instead, as petitioner acknowledges (Pet. 7), this case simply presents the question of whether the lower courts correctly interpreted the 1989 version of Guideline § 2Q2.1(b)(3)(A) to cover petitioner's Lacey Act offenses. Petitioner contends that the 1989 version of that Guideline cannot be used to enhance his sentence because deer are not "specially protected" wildlife within the meaning of the Guideline. As the court of appeals correctly held, however, there is "no distinction between

---

defined as the price a willing buyer would pay to a willing seller, or "replacement value less the amount of depreciation that occured during the time that the property was in the possession of its owner." The court stated that "[t]he second measure of value, replacement value less depreciation, would best have been left unsaid" because its meaning was unclear. In the instant case, the jury was instructed that it had to determine "market value," as the Act's penalty provision explicitly required, and that the value could be estimated by considering the price paid for guiding services. That definition did not have the vice of lack of clarity that infected the "replacement value less depreciation" formula in *Wentz*.

specially protected wildlife and wildlife taken in violation of the Lacey Act" under the consolidated 1989 version of Guidelines § 2Q2.1(b)(3)(A); Pet. App. A18. When the Sentencing Guidelines were amended as of November 1, 1989, Section 2Q2.2, which had applied to violations of the Lacey Act, was deleted. The sentencing provision for the Lacey Act was then consolidated with Section 2Q2.1, which had applied to other wildlife protection statutes such as the Endangered Species Act. See Sentencing Guidelines App. C, Amend. 209, Commentary (Nov. 1, 1990) ("The purpose of this amendment is to consolidate two guidelines that cover very similar offenses."); see also note 4, *supra*. While the consolidated version of Section 2Q2.1 retained the reference to "specially protected" wildlife, the commentary made clear that the Sentencing Commission intended that provision to apply to violations of several different wildlife protection statutes, including the Lacey Act. See Sentencing Guidelines § 2Q2.1, Commentary (Nov. 1, 1990) (expressly stating that "[t]his section applies to violations of * * * the Lacey Act").

Petitioner relies on a post-sentence amendment to Section 2Q2.1, which deleted the reference to "specially protected" wildlife that, as the Sentencing Commission explained, had been "inadvertently retained when this guideline was consolidated with the former § 2Q2.2." Pet. App. A17-A18, quoting Sentencing Guidelines App. C, Amend. 407 (commentary) (Nov. 1, 1991). Petitioner ignores the fact that the commentary to the 1989 consolidated version of the Guideline stated that the 1989 version applied to violations of the Lacey Act. The subsequent deletion of the words "specially protected" in 1991 thus did not effect a substantive change in the reach of Section 2Q2.1, but rather constituted simply a clarification of the language of the 1989 version, which was intended to have no substantive effect. For that reason,

petitioner's sentence was properly imposed under the Sentencing Guidelines, and there is no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWARD J. SHAWAKER
EVELYN S. YING
Attorneys

MARCH 1993